SHORT-TERM IMPRISONMENT OF OFFENDERS

THESIS SUBMITTED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN

LAW

BY

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ABSTRACT

The present study entitled as "Short-term Imprisonment of Offenders" focuses on the effects of short-term imprisonment on the offender in particular and society in general. The sentence of imprisonment is imposed to achieve various objectives of punishment such as deterrence, retribution, reformation and rehabilitation of the offender. It is said to be the only custodial punishment which makes it possible to reform and rehabilitate the offender in an insitution. The studies of the effects of imprisonment on the prisoners show that it does not seem to have any deterrent reformative or rehabilitative influence on the short-term offenders, rather it returns them to society infected with all types of vices.

Short-term imprisonment, instead of producing good effects on the over all personality of the offender becomes counter productive. It has been noticed that since most of the prisons are overcrowded, it becomes difficult for the prisons to make proper segregation of prisoners. The result is that new inmates even though they are sent to prison for short stay come in contact with the recidivites and experienced people of the underworld. This contact provides them an opportunity to learn and acquire technique of committing crimes.

The offenders who are serving short-term sentences get humiliated more than being rehabilitated. The society also suffers. It loses the productivity of the offender. The family members are deprived the source of maintenance and income.

Persons sentenced to short-term imprisonment (also known as short-termers) are a burden on the state. A major chunk of the public funds is spent in their maintenance and upkeep in prisons. It is estimated that to keep a prisoner in an institution is twenty times more than to release an offender on probation or community service order.

A number of studies as to the effects of short-term imprisonment show that a prison term less than six months is not likely to be useful for training, education and rehabilitation of the offender.

Chapter I introduces the topic of the research. First the problem of short-term imprisonment has been highlighted. The use of short-term imprisonment does not seem to fulfill the objects of punishment, rather it appears to be counter productive. Neither does it provide protection to society against crime nor it turn an offender into a good citizen. The next issue which has been discussed is the definitional problems of short-term imprisonment. The period of incarceration that may be termed "short-term imprisonment" has not been defined in the laws of the India and Malaysia. However, Section 354(4) of the Indian Code of Criminal Procedure identifies three months. This provision discourages the court to impose short-term sentence and requires the courts to give reasons for imposing short-term imprisonment. The object of incorporating this provision is the realization of the ill-effects of short-term imprisonment. The extent and magnitude of the problem of short-term imprisonment has also been highlighted.

Chapter II deals with forms and uses of imprisonment. In this chapter, place of imprisonment, its nature, efficacy, merits and weaknesses have been evaluated.

Imprisonment plays an important role in criminal justice system. It is employed to serve various purposes. It keeps a person in custody during trial and is also used as a substituted punishment in order to force the people into compliance with the orders of the court. It protects society by putting an offender behind the bar. It makes possible the reformation and rehabilitation of the offender. It also acts as individual and general deterrence so that the prospective offenders will take a lesson from the confinement of offenders. It also satisfies society's desire for vengeance on behalf of the victim.

Imprisonment though aimed to achieve the above mentioned purposes is said to have many short-comings. It is said to provide wild justice in the form of crude retribution and have brutalising effect. It does not rehabilitate the offender and is detrimental to the re-entry of the offender into society. The most serious drawback of imprisonment is that it provides an opportunity to the short-termers to learn the technique of committing crimes in a short span of time. Most of our prisons are packed to the capacity causing overcrowding. Overcrowding in prison makes it impossible for the prison regime to make proper segregartion of the prisoners. The prisoners are forced to stay with the recidivists, thus giving them an opportunity of learning criminal habits.

This chapter also discusses the types of imprisonment. The main types discussed include imprisonment for life, imprisonment for a fixed period i.e. simple and rigorous and imprisonment in default of payment of fine.

Chapter III focuses on short-term imprisonment. In this chapter an appraisal has been made of the effects of short-term imprisonment on the society and its implications on prevention of crimes and treatment of offenders.

One of the direct impacts of short-term imprisonment is its financial aspect on society and the offender. The society suffers by short-term sentences in two ways. Firstly, it is the most expensive way of dealing with the offenders. As noted above that the cost of maintaining the offender in prison is twenty times more than releasing the offender on probation or community service order. Secondly, the society loses in terms of productivity of the confined offender. Short-term sentence is also a source of hardship to the family of the confined prisoner. It deprives them from the earnings of the prisoner thus placing them at the mercy of charitable institutions. It also damages the self-respect of the offender and gives him a label of ex-convict. Short-term imprisonment is also a contributing factor to overcrowding in prisons. Most penal institutions in India and Malaysia are confining short-termers, making it difficult for the prison administration to apply reformative and rehabilitative methods on the prisoners. Overcrowding in prisons also makes it impossible to keep the short-termers or first offenders away from hardened criminals. It has been found that in the case of short-termers or petty offenders, prison term becomes counter productive and turns them into professional criminals.

The majority of prisoners in India consist of short-termers serving less than six months. It is estimated that in Indian prisons 66% in 1911 and 87% in 1961 were prisoners with less than six months' sentence. In a later survey conducted after a decade, in 1976, it was found that short-term sentences range between 85% to 95%. In Malaysia the situation is not much different. In the year 1993, prisoners serving less than six months were 47% of the prison population. During 1994 this figure rose to 51% and in 1995, 46% of offenders were imposed less than six months' sentence.

Chapter IV evaluates the role of non-custodial measures as an alternative to short-term imprisonment. The statistics of the prison population of India and Malaysia reveal that a large number of offenders of inmates consist of short-termers, and they are subjected to all types of vices. This chapter suggests various alternative non-custodial measures that may be employed to avoid short-term imprisonment. The alternative measures suggested include absolute or conditional discharge and binding over, probation, fine, community service order and attendance centres.

In India and Malaysia, the law relating to absolute or conditional discharge exist in the criminal procedure of both the countries. It is seen that unlike the Malaysian provision (Section 173A and 294 of the Criminal Procedure Code), the Indian provisions (Sections 360 and 361 of the Criminal Procedure Code) dealing with absolute and conditional discharge are mandatory in nature. If the circumstances of the case demand application of the these provisions and the court fails to apply them, it shall record its reasons for not doing so. The omission to record reason is an irregularity and on appeal if any miscarriage of justice has occasioned by the decision of lower court; the sentence may be set aside. In India this provision has helped the

court to a certain extent to contain prison population especially of petty offenders. In Malaysia if provision is made similar to Section 361 of the Indian Code of Criminal Procedure, it can protect the short-term offenders from the ill-effects of prison life.

This chapter also presents probation as an alternative to short-term imprisonment. In view of the high expenditure involved in maintaining petty offenders in prisons, probation appears to be most cost effective. The probation law in Malaysia is contained in the Juvenile Courts Act and Criminal Procedure Code. The case study of the cases decided by the courts show that probation is granted mostly to the juvenile while adults (youthful offenders) are rarely released on probation. But the statistics supplied by the Department of Social Welfare revealed that more adults than juveniles who were granted probation completed their probation period successfully. In India, the law concerning probation is contained in the Code of Criminal Procedure 1973, various state legislation and the Probation of Offenders Act. The Probation of Offenders Act is a central legislation which is applied in most parts of the country. The Act is designed to protect youthful offenders into obdurate criminals as a result of their association with hardened criminals who are sentenced to short-term sentence. The Indian provisions of probation are more comprehensive than Malaysian provisions.

Fine is also an important alternative to short-term imprisonment available to the courts in India and Malaysia. It is estimated that in 90% of the criminal cases, fines were imposed. This chapter assesses the utility of fine as a substitute to short-term sentence. To assess its proper place in the correctional system advantages and disadvantages of fine have been discussed. One of the important issues discussed

relates to the use of fine in place of default imprisonment. In the cases where the offender is unable to pay, the amount of fine he may be allowed to pay it in instalments. Fine can be a good substitute to short-term imprisonment in India and Malaysia, provided some statutory provisions are made to make the mode of payment flexible. In the United Kingdom, Section 71 of the Magistrate's Courts Act 1952, empowers the court to place an offender under supervision until the fine has been paid.

This chapter also looks at the viability of community service order as substitute to short-term imprisonment. In India and Malaysia no statutory provision exists for making community service order. However, in the United Kingdom, the provision has been made by the Powers of Criminal Courts 1973. In India the Indian Penal Code (Amendment) Bill 1972, which contained provisions for the introduction of community service order was presented before Rajya Sabha (the Upper House of Indian Parliament) which passed the Bill in 1978. But it could not be taken up by the Lok Sabha and with the prorogation of the Parliament, the Bill lapsed. Since then successive governments in India did not care to put the Bill on legislative lists. However, recently Mr. Ramakant Khalap, Indian Minister of Law and Justice, while visiting Kuala Lumpur on 3 September 1997, had announced that the Government of India is seriously considering to introduce community service as a penalty.

Attendance centres may also reduce the pressure on prison population and can be a good substitute for short-term imprisonment. In Malaysia, such centres were introduced by Compulsory Attendance Ordinance 1954. Unfortunately these centres are no more functioning in Malaysia. In India so far such centres have not been

established. This chapter also sees the viability of establishing these centres in India and revival in Malaysia.

Chapter V assesses the importance of mitigating factors affecting short-term imprisonment. The mitigating factors may affect sentencing process in different ways. It may lessen the quantum of punishment as where an offender is sent to prison for a short-term or fined a small sum of money. Sometimes, mitigating factors may influence the court to completely abandon the idea of punishment and to apply non-custodial measures such as probation, conditional discharge and the use of other community based sanctions. Some of the mitigating factors discussed in this chapter include: age of the offender, his record, good character, circumstances resulting in the commission of the offence, plea of guilty, health of the offender, effect of sentence on the family and behaviour subsequent to the commission of the offence.

The mitigating factors do help the court whether to use institutional or non-institutional methods of punishment. These factors may be helpful to the courts to impose appropriate sentence in cases punishable with short-term imprisonment.

In India no specific provision has been made by law for the consideration of mitigating factors, however the Probation of Offenders Act mentions some factors such as age, character and antecedents of the offenders. In Malaysia statutory law makes provisions for the consideration of mitigating factors and the courts are required to incorporate in notes of evidence.

Chapter VI evaluates the use of Islamic penal punishment or *ta'zir* as an alternative to short-term imprisonment. Islamic penal system contains mandatory, retaliatory and discretionary punishments. The offences for which these punishments are prescribed fall into three groups: (i) *Hudud*, (ii) *Qisas* and *Diyat* (Retaliation and Blood Money), (iii) *Ta'zir* (Discretionary punishments). For the first two cataegories of offences, punishments are prescribed by the Holy Quran and Sunnah of the Prophet (S.A.W). While for offences punishable with *ta'zir* or penal punishments, the Ruler has been conferred the right to create offences by legislation and to prescribe punishments in accordance with the prevailing circumstances of the case so as to treat and reform the offender and to prevent him from repeating the offence. Imprisonment falls in the category of *ta'zir* or penal punishments. It is divided in two kinds: For a limited or that of unlimited term. The imprisonment for a limited period is one day while unlimited term is to be decided by the Ruler in accordance with the nature of the offence and circumstances of the case. The evils of imprisonment were well realised by the jurists of Islamic law. They discouraged the use of imprisonment rather they recommended the use of other types of *ta'zir* or penal punishments.

Fine is one of the punishments prescribed for offences liable to *ta'zir*. The penalty of fine as a mode of punishment is accepted by all schools of Islamic jurisprudence. In some cases the amount of fine was fixed e.g. in the cases of theft in which the value of stolen property did not reach the minimum *nisab*. In other cases it was left to the discretion of the Ruler or Qadi to fix the amount of fine according to the gravity of the offence and the capability of the offender to pay. Islamic penal law prohibits imprisoning an offender who is unable to pay fine. He can only be imprisoned for non-payment of fine when he is capable to pay it but fails to do so.

Islamic law also allows to make the offender to work and pay the amount of fine out of the wages earned by him.

Islamic law provides public disclosure or *tashhir* as a penal punishment. By this punishment the offence committed by the offender is announced in public. The purpose of this punishment is to draw the attention of the public to the fact that the offenders should not be trusted. Public disclosure or *tashhir* can be a good substitute for petty offences liable with short-term imprisonment.

Threat or *al-Tahdid* is another form of *ta'zir* punishment which requires the offenders to put under fear of punishment. It is carried out either by putting the offender under fear of punishment if he repeated the offence or the execution of sentence is delayed until the offender has committed another offence within a stipulated period. This punishment is similar to the modern punishment of suspended sentence. However there is a marked difference between Islamic law and modern form of suspended sentence. In Islamic law the judge has the authority to suspend any sentence including imprisonment while under modern penal system the judge cannot suspend a sentence other than the sentence of imprisonment.

Warning or admonition is also a form of punishment under Islamic penal law. The purpose of this punishment is to caution or remind the offender of criminal activities. This punishment is similar to the modern form of probation. Admonition has existed in Islamic Law for the last thirteen centuries while in western system admonition is of recent origin and applied only at the end of 19^{th} century or the beginning of the 20^{th} century.

Boycott is also one of *ta'zir* punishments prescribed under Islamic law. Modern form of "ex-communication" practiced in some societies is close to Islamic law of boycott. An order of ex-communication may be a good substitute for short-term imprisonment.

By making provision of *ta'zir* or penal punishments, Islamic law discourages the use of imprisonment due to the evils involved in imprisonment as a form of punishment. The imprisonment is allowed to be imposed only in the circumstances when it is not possible to deal with the offender by any other form of *ta'zir* punishment. Islamic penal law provides a wide range of punishment in the category of *ta'zir*. These punishments are both deterrent and reformative in nature and therefore can be a good substitute for short-term imprisonment.

Chapter VII deals with conclusions and suggestions. In this chapter comparison has been made of various provisions of Indian laws and Malaysian visa-vis. Islamic penal law, with a view to setting forth conclusions of the study in order to advance some suggestions to meet the problem of short-termers in India and Malaysia.

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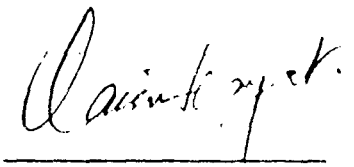
CERTIFICATE

THIS IS TO CERTIFY that **Mr. Mohammad Akram** has completed his doctoral work entitled "**Short-Term Imprisonment of Offenders**". The work commenced at Aligarh under my supervision and has been completed in accordance with rules.

I wish him success.



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This Thesis is Dedicated to the Loving Memory of My Parents:

Al-Haj Mohammad Swaleh and Hajiyah Aziz Jahan Begum

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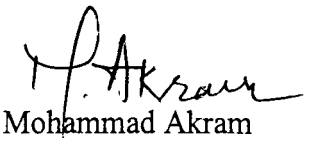

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LIST OF ABBREVIATIONS

A.I.R.	All India Reporter
C.L.J	Current Law Journal
C.P.C.	Criminal Procedure Code (Malaysian)
Cr.P.C.	Code of Criminal Procedure Code (Indian)
Cr.L.J.	Criminal Law Journal
Crim.L.R.	Criminal Law Review
I.P.C.	Indian Penal Code
I.A.	Indian Appeal
P.C.	Privy Council
P.P.	Public Prosecutor
S.C.	Supreme Court
S.C.C.	Supreme Court Cases
M.L.J.	Malaya Law Journal
U.N.A.F.E.I.	United Nations Asia And Far East Institute

CHAPTER ONE

INTRODUCTORY REMARKS

1.1 THE PROBLEM

The failure of imprisonment as a medium and correctional measure of treatment has been a noticeable feature of the current crisis in the criminal justice system in many countries of the world including India and Malaysia. There is a growing tendency to reserve imprisonment to hardcore offenders for whom a deterrent sentence is appropriate and who need not be subjected to any other alternative sentencing procedure. Imprisonment is increasingly becoming an exception rather than a rule for dealing with convicted offenders. The use of short-term imprisonment serves neither the need of public protection against the crime nor can it fulfil any correctional needs of the offender. It is deprecated in major legal systems on account of its futility.

Despite its ineffectiveness the laws of India and Malaysia prescribe a short dosage of imprisonment in a large number of situations. However, these laws generally prescribe the maximum term of imprisonment only, and in exceptional circumstances, the minimum is also inducted. The Courts have been conferred adequate discretion to award any term of imprisonment which it deems proper in the situation and circumstances of the case. In many offences fine is an alternative to imprisonment. It is to be realised that there is a risk of awarding imprisonment in every case for which sentence of imprisonment has been prescribed by law. The most serious problem associated with imprisonment is what is called "prisonisation." The prisoner placed in a new environment which has its own culture and value is affected

by the direct impact on his earlier culture to which he was subjected before he entered the prison. The first casualty is his personal identity. He is known by numbers and not by his name. His daily routine is completely changed in order to adjust with other members of the prison community. The sub-culture of prison life is more likely to surface on the earlier culture of the prisoner. His assimilation in the sub culture of the prison life is likely to effect his habits and attitude of life. He is likely to adopt criminal tendencies as a result of association with hardened criminals. It was rightly said in the Report of the Indian Jails Committee:

> "Whatever improvement may be effected in the prison administration it must, we fear, still remain true that imprisonment is generally evil and that all possible measures should be taken to avoid commitment to prison when any other course can be followed without prejudice to the public interest."[1]

The main objective of imprisonment is to meet the contemporary demands of retribution, deterrence, correction and rehabilitation of offenders. The question may be asked whether imprisonment can achieve these widely differentiated and inter se contradictory objectives of criminal justice system? The fact is that in our prisons the majority of prisoners are short-termers. They are sent there for a short stay. During their short stay they hardly get treated or corrected. Instead they come back contaminated with all types of vices. The correctional objectives of imprisonment is not achieved during such a short stay.

[1] The Report of the Indian Jails Committee 1919-20 (cmd 1303) at p.35.

1.2 THE SHORT-TERM IMPRISONMENT: DEFINITIONAL PROBLEM

One of the basic issues is how short a period of incarceration can be regarded as "short-term imprisonment". This term has not been defined either in Indian law or Malaysian law. However Section 354 of the Indian Code of Criminal Procedure in sub-section (4) states thus:

"When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less that three months it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code."

The above mentioned provision of the Indian Code of Criminal Procedure reflects the modern trend of penology and discourages the Courts to pass short-term imprisonment. The period identified in this section for short-term imprisonment is three months. When an offence is punishable with imprisonment for a term of one year or more, but the Court imposing the sentence imposes a sentence of imprisonment of less than three months, it shall record reason for awarding such sentence. The mandatory nature of the provision requiring Courts to give reasons for awarding less than three months shows that such short period of sentence should be minimally used and only in the extreme circumstances specially when no other form of punishment is possible.

It is asserted by theoreticians and penal administrators that such short stay of the offender in prison serves no useful purpose rather it produces deleterious effect.

His short visit to prison removes in him the normal fear for jail and is likely to turn him towards the life of crime where he learns more about the modus operendi of crime in contact with other hardened criminals of the underworld in the jail. The memorandum of Prison Commission of England and Wales, 1945 stressed that in order to obtain full benefit of the training in prison, the minimum twelve months term of imprisonment would be required. W. Norwood East and Hubert in the Report on the Psychological Treatment of Crime also suggested that sentence of less than six months was insufficient for psychotherapeutic treatment in prison[2].

A ban on institutional treatment of less than three months duration has been advocated much earlier. This view is based on the fact that such short duration is worthless as reformative or rehabilitative. During such a short stay, neither is it impossible for the prisons to exert any reformative influence nor is the fear of short sentence likely to have any deterrent effect. In this way for the majority of the prisoners, imprisonment does not serve any useful purpose. The United Nations Conference at the Hague had as early as in 1951 in their resolution held that short-term imprisonment causes serious inconvenience from a social, economic and domestic point of view.

Some studies have indicated that short-term imprisonment has failed to achieve the objectives of deterrence, reformation and rehabilitation. It does no more than to confine the prisoners rather it leads to internalise of certain undesirable learning habits. The mere fact that imprisonment results in restriction on individuals movement, however is far less serious than the fact that the inmate is cut off from

[2] W. Norwood East and Hubert *The Psychological Treatment of Crime* London, Her Majesty's Stationary Office, (1939) para 171

family, relatives and friends not in the self isolation of the hermit but in the involuntary seclusion of the outlaw[3]. But what makes more painful to the offender is the fact that his confinement represents a deliberate moral rejection of the criminal by free society[4]. This is more prominent in the cases of short-term imprisonment.

One of the major criticisms leveled against imprisonment is that it is the breeding ground for criminality. The confinement of the prisoner in the company of the recidivist makes offenders less law abiding. The constant contact with the experienced people of the underworld provide them an opportunity of learning new techniques of committing crimes. This results in return to crime by them after their release.

This is more so in the case of short-termers who are sent to prisons and come back with all types of vices. They are forced to stay with such prisoners whose attitude and value of life are different with their own.

Imprisonment not only exposes the prisoners to the influence of other inmates, but also subjects them to the mercy of the prison staff. The rules and standing orders which prohibit activities of the prisoners are applied with bureaucratic strictness and are also used to harass the prisoners. Occasionally a prisoner, whether through mishandling or because of his aggressive attitude becomes uncontrollable.

One of the worst sufferers of short-term imprisonment are family members of the individual. They are deprived of financial and moral support. Moreover, they also

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[3] Gresham Sykes, *The Pains of Imprisonment*, Princeton, Princeton University Press (1958) p. 65.
[4] Ibid.

get psychologically depressed by the humiliation to which, they are subjected by the commitment to the prison.

Short-term imprisonment is a very heavy burden on society. Society suffers in two ways. Firstly, it bears heavy expenses in maintaining them in prison. Their short stay in prison brings them no good to society. Secondly, society loses the confined persons' productivity and support for his dependents. During incarceration he loses his job and on his return he is seldom given an opportunity to take up his old job, thus he relapses into the life of crime.

Short-term offenders are also a stumbling block to implementation of corrective and rehabilitative measures. The bulk of the prison population consists of short-termers whose short stay in the already crowded prison makes it difficult to impart to them any rehabilitative technique. Rather their presence in the prisons affect the rehabilitative and corrective measures of the prison authorities that are intended for long term prisoners.

Instead of the criminal moving away from crime and criminal tendencies, imprisonment provides an ideal breeding ground for some offences. The most serious problem related to imprisonment is that it brings stigma to the prisoner. Once he is sent to prison he gets the label of ex-convict and on his return to society he faces tremendous hardships in getting himself settled in the society. It is said that the real punishment begins after he leaves the prison.

1.3 EXTENT AND MAGNITUDE OF PROBLEM

The problem of short-term imprisonment is a persistent one. Large numbers of convictions continue to be with short-term sentences ranging from one to three months. Mr. Barker who was Inspector General of Prisons in India for many years in his book, "*The Modern Prison System of India*" wrote that short-term sentences were on the rise. The majority of convictions were of simple imprisonment with short sentences of one month or less, which represented 19% of total admission; he described this as a regrettable feature of the Indian penal administration and a real obstacle to prison reform.

There has been a sharp increase in short-term sentences in India. This is evident from the fact during the year 1941, 261,908 were convicted and sentenced to various terms of imprisonment 172,399 offenders or 66% were awarded up to six months imprisonment. During 1951, 375,265 were found guilty and were given various terms of imprisonment. 304,667 offenders or 81% were awarded up to six months imprisonment. Similarly in the year 1961, 467,568 offenders were convicted for various offences and sentenced to various terms of imprisonment. Out of this, 409,018 offenders or 87% were awarded imprisonment up to six months[5]. The data discussed above shows that short-term imprisonment in India is on the rise. Another study shows that the problem still persists. In this study, it was found that the erratic, outmoded and unscientific sentencing that has prevailed in India has increased the number of short-term prisoners to the extent of 85% of total number of offenders

[5] E.N. Sabhahit, *Sentencing by Courts in India*, Bangalore, Dixit Publications (1975) p. 270.

awarded prison sentences. In some states of India their proportion was as high as 95%[6].

The problem of short-term imprisonment in Malaysia is not much different with that of India. In the year 1993, the number of prisoners admitted in Malaysian prisons to serve various terms of imprisonment were 24,772. It was found that 47% were serving less than six months imprisonment, 43.2% were serving six months to below 3 years imprisonment, 7.1% 3 years to below 6 years, 1.3% 6 years to below 10 years[7]. Similarly, during the year 1994 the number 30,601 of prisoners were admitted in Malaysian prisons, 51.4% prisoners were serving less than 6 months imprisonment, 40.4% were undergoing between 6 months to 3 years, 5.7% 3 years to below 6 years, 1.2% 6 years to below 10 years, 0.8% 10 years to below 15 years, 0.2% 15 years to 20 years[8]. In the year 1995, total prisoners confined in Malaysian prisons were 29,228. Out of this number, 46.6% were serving less than 6 months imprisonment, 45.2% were undergoing 6 months to below 3 years imprisonment, 5.6% were serving 3 years to below 6 years, 1.3% were undergoing 6 years to 10 years, 0.7% were serving 10 years to 15 years and 0.1% were undergoing 15 years to 20 years imprisonment or more[9].

The prison records of India and Malaysia reveal that a majority of prisoners in Indian and Malaysian prisons comprise of short-termers who are serving less than six months. These prisoners who are sent to prisons for a short stay are a burden on the prison administration and a heavy burden on the tax payer. Instead of putting them in

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[6] M. Zakaria Siddiqui, *The Prison as a Correction Agency*, Social Defence, New Delhi, Government of India Publications (1976) p. 28.
[7] The Annual Report, 1993, Prisons Department of Malaysia, Kuala Lumpur.
[8] The Annual Report, 1994, Prisons Department of Malaysia, Kuala Lumpur.
[9] The Annual Report, 1995, Prisons Department of Malaysia, Kuala Lumpur.

the already overcrowded prisons it would be advisable to dispose of the cases of such offenders who have committed minor offences punishable with short-term imprisonment to be dealt with non-custodial methods of treatment.

1.4 SCOPE OF STUDY

The review of literature on problems associated with imprisonment, its forms, its uses and its administration disclose the hallow claims of this form of punishment serving the objective of the protection of society. It fails to serve the objectives of deterrence, prevention and reformation. Imprisonment for a short duration is worse with respect to the purposes which it is supposed to achieve.

There is a dearth of researches on short-term imprisonment. Few studies have been undertaken in other countries but none either in India nor Malaysia. The absence of literature on short-term imprisonment and a thorough study of various ramifications of this problem were the to undertake the present study. ; which crime the present study to be uncertain.

The present study is therefore based on a general premise that short-term imprisonment is inappropriate and least cost effective. Hence, it needs replacement by measures other than imprisonment. To substantiate this premise a number of hypothesises have been generated to deal with the issue:

1. The form and the uses of sentence of imprisonment, the theory which supports it, the merits and demerits of imprisonment are inherent in the system of short-term imprisonment. To examine this hypothesis a deeper analysis of the sentence of imprisonment and its administration is needed.

2. The power to impose sentence confers wide discretion on the judges. Short-term imprisonment is directly related to the sentencing practices of the Courts. Our second inquiry is to find out in what types of offences and what type of offenders get sentenced to short-term imprisonment. An investigation in this issue will provide an insight in to possible alternatives.
3. Our third hypothesis is that a penal system which offers a variety of non-custodial measures can serve societal needs better than the insistence on the use of short-term imprisonment.
4. The use of short-term sentences and non-custodial measures as an alternative largely depend on how the Courts evaluate the mitigating factors present in the a particular case. Will the Court give due consideration to these factors in avoiding a sentence of imprisonment? An answer to this issue will require analysis of the case law of India and Malaysia.
5. Short-term imprisonment did not create any problem under Islamic penal system. In view of a large variety of alternatives as ta'zir punishments in the system. Can we adopt and integrate some of these alternatives into our penal laws particularly in Malaysia, where Shariah Courts are conferred with limited criminal jurisdiction.

1.5 RESEARCH METHODOLOGY

The study is comprehensive in nature. It deals with the problems of short-term imprisonment in India and Malaysia. Two primary sources of legal material, the statutes and the case law of the two countries have been the basic data for this study. Textual material as well as reference material on penology and sentencing pertaining to short-term imprisonment was examined. The secondary sources consisted of the

reference journals, seminar papers, the previous research works, the government reports and the available information for Ministry sources was obtained and has been used in generating various hypothesis listed above and also for their verification. Textual material on the Islamic penal system was examined to assess the scope and the possibility of Islamic penal alternatives to short imprisonment. In order to substantiate the hypothesis, the sentencing practices of the lower Courts as well as the study of the case law was undertaken to this effect.

The study is basically doctrinal in nature based on the analysis of the literature available. No effort was made to undertake any empirical survey for this study. The present work aims at developing settled working hypothesis which may eventually be taken up in subsequent researches to test them empirically.

1.6 PLAN OF STUDY

This thesis has been divided into seven chapters. The present chapter deals with the problem, its extent, scope and methodology used.

Chapter II sets forth forms and uses of sentence of imprisonment. Imprisonment is one of the important forms of punishment and occupies a unique place in the criminal justice system. The purposes of imprisonment have been discussed in order to ascertain the efficacy of this form of punishment. The merits and demerits of imprisonment have been highlighted. The various types of imprisonment such as imprisonment for life, imprisonment for a fixed term, concurrent and consecutive sentences have also been discussed. The issues relating to imprisonment in default of fine have also been touched upon.

Chapter III deals with short-term imprisonment. Short-term sentences are the outcome of the decision of the Courts. The Courts have been widely conferred the discretion to award long and short-term sentences. Therefore, in this chapter, the judicial attitude towards various offences punishable with short-term sentences and the type of offenders who get punished for such offences have been delineated.

Chapter IV attempts to see the reliability of non-custodial measures as an alternative to short-term imprisonment. Some non-custodial measures are provided under the Criminal Procedure Codes of India and Malaysia while some of the measures are found in other statutes. Absolute and conditional discharge and binding over are specifically dealt with under the Criminal Procedure Code. An important non-custodial measure is probation. The Indian law on probation is more explicit and very wide compared to that in Malaysia. Besides ss. 360 and 361 of the Code of Criminal Procedure, Sections 3 and 4 of the Probation of Offenders Act empowers the Court to release the offenders on probation of good conduct. The Malaysian law under Section 173A, 293 and 294 of the Criminal Procedure also make provision for the release of youthful offenders on probation of good conduct.

The judicial approach towards the application of these statutory provisions have been elucidated and analysed. This chapter also attempts to see the role of fine as an alternative to short-term imprisonment. The use of community based sanctions as an alternative to short-term imprisonment has also been considered. Although no law exists as to the use of community service order in India and Malaysia, however the desirability of introducing this form of punishment has been felt. This is evident from the fact that both countries are examining the modalities of this form of punishment.

The use of attendance centres as a substitute for short-term sentence has also been considered. In Malaysia the law exists as to the establishment of attendance centres, but in India no such statute is in existence under which attendance centres could be established.

Chapter V is devoted the factors affecting short-term imprisonment. In this chapter, use of mitigating factors in reducing the quantum of punishment have been assessed. This chapter examines the role of mitigating factors in the sentencing process of the courts so as to avoid short-term sentences. Factors considered include age of the offender, his record, good character, circumstances resulting in the commission of the offence, plea of guilty, effect of sentence on family and behaviour subsequent to the commission of the offence.

Chapter VI attempts to unravel the alternative to short-term imprisonment under the Islamic Penal system. This chapter briefly discusses the various punishments prescribed under the Islamic Criminal law. The analysis of the objects of punishments shed light on the reason as to why. The emphasis is laid on ta'zir or penal punishment as a general system of punishment in Islam. These are the punishments in which much discretion has been given to the ruler or the Qadi to award punishment in accordance to circumstances and situation of the offender. The various types of ta'zir punishment that have been discussed include flogging, exile, imprisonment, fines, public disclosure, threat and warning or admonition. In this chapter comparison has also been made between Islamic penal punishment and modern forms of punishments.

Chapter VII deals with conclusions and suggestions, with a view to setting forth the conclusion of this study and to advance suggestions to meet the problem of short-termers in India and Malaysia.

CHAPTER TWO

FORMS AND USES OF IMPRISONMENT

2.1 INTRODUCTION

Offenders undergoing short-term sentences in any case have to undergo the agony of imprisonment. This chapter is devoted to the examination of various ramifications of imprisonment as a form of punishment.

Imprisonment is the main and most extensively used form of punishment globally. It has existed from time immemorial throughout the world. Initially it was applied as a part of slave labour mainly in ancient Rome, Egypt, China, India, Assyria, and Babylon. It was firmly established in Europe after Renaissance, where it was also applied to the mass of petty offenders, vagrants, alcoholics, beggars, and the debtors[1]. However, imprisonment as a form of specific punishment is relatively of recent origin. It started as an interim house of detention of an offender pending his trial and punishment. Soon, it came to be realised that the process of imprisonment, involving detention in isolation from family and community, could itself be considered as convenient mode of punishment to replace old modes of punishment such as banishment and corporal punishment. Many countries readily adopted it as part of their criminal justice system.

[1] Norval Morris, *The Future of Imprisonment*, London, The University of Chicago Press (1974) p.4; also see Roman Tomesic and Ian Dobinson, *The Failure of Imprisonment*, Sydney, George Allen (1979) p.7.

This chapter examines the place which imprisonment occupies in the criminal justice system. The use of imprisonment, its nature, efficacy, merits and weaknesses are explored. A perusal is also made of various forms of sentences of imprisonment which courts administer in Malaysia and India.

2.2 PURPOSES OF IMPRISONMENT

Imprisonment is used to achieve the following purposes:

(a)*Detention during trial*: Imprisonment is employed to keep a person in custody until he is tried, sentenced, or taken to the place to which he would be sent after being sentenced. This is a task which, causes inconvenience and in some cases hardship to some people who are eventually acquitted without being called to put up defence.

(b)*Substituted Punishment*: It is used to force the people into compliance with orders of the court. The common example is its use for non-payment of fines and civil detention of judgement debtors.

(c)*Protection of Society*: The Society is protected from offenders by taking them out of circulation. This purpose is achieved at least during period of detention.

(d)*Treatment of offender*: The person imprisoned is detained for long enough to make it possible for a prolonged course of treatment. This may not be possible in other modes of punishment.

(e)*Individual deterrent*: Imprisonment acts as individual deterrent[2] with the hope that the pains of confinement in the prison will discourage the prisoner from taking the risk of another conviction and sentence. The assumption being that if potential offender will see the sentence likely he will be inclined to avoid breaking the law.

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[2] Brody S.R, *The Effectiveness of Sentencing*, London, Her Majesty's Stationary Office, (1976) p.2.

(f)*General deterrence*: Imprisonment acts as general deterrent. It discourages many criminal minded persons to break the law in a similar way. The effectiveness of this method of penal sanction is measured by looking at the reconviction rates. Taking reconviction as a measure, it has been seen that about three-quarters of those who serve a prison sentence for the first time do not return to prison, but it is possible that some of them would not have been re-convicted if they had been subjected to other penal measures[3].

(g)*Retribution and just desert*: Another goal of imprisonment as a sentence is to inflict retributive punishment. Accordingly, punishment is conceived as an end in itself quite apart from any deterrent or reformative effect. Retribution is supposed to fulfil society's desire for vengeance on behalf of the victim, its "emphatic denunciation" of the conduct prohibited by criminal law, and its reaffirmation of the moral obligation to protect people's life, property and honour[4]. Retribution is also considered as a 'just desert' to the offender for his crime.

(h)*A safe haven*: Sometimes unofficially the imprisonment may act as a safe haven to an offender against retaliation by the victims or their relatives. Nevertheless, it is also true; not all offenders are always safe inside the prison. Their fellow inmates may subject them to attacks[5].

[3] Andrew Ashworth, *Sentencing and Penal Policy*, London, Weidenfeld and Nicholson, (1981) p.32.
[4] Henslin, James M, *Social Problems* (2nd Ed.) New Jersey, Prentice Hall (1990) p.233.
[5] Nigel Walker, *Sentencing Theory Law and Practice*, Butterworths, London, (1985) pp(125-126).

2.3 MERITS OF IMPRISONMENT

2.3.1 Individual Deterrance

The object of imprisonment is to teach the convicted person a lesson in order to deter him from repeating his offences[6]. It is hoped that experience will leave an unpleasant memory that will discourage the ex-prisoner from risking another sentence. In other words, it will act as individual deterrent. Most of the persons sent to prisons may feel humiliated, frustrated and depressed and hence may fear a repetition of the offence. However, in cases of offenders who are imprisoned the second or third time, imprisonment does not seem to have any deterrent effect on them. It is only those who are imprisoned on their first conviction who appear to be encouraged to avoid another conviction[7]. The courts also seem obliged to impose another term of imprisonment, sometimes in order to maintain the credibility of prison as a general deterrent, sometimes to protect others, and at other times because it is regarded as the deserts of the offenders[8].

In *Public Prosecutor v. Wong Chak Heng*[9], the appellant pleaded guilty in the magistrate's court to two cases of theft. Both cases were heard on the same day and the respondent was fined $200 and $300 respectively for the first and second offence. The Public Prosecutor appealed against the inadequacy of the sentence imposed on the respondent for both offences. The appeal court allowed the appeal and held that in

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[6] Clayton C.Ruby, *Sentencing*, Toronto, Butterworths, (1994) p.9.
[7] A study undertaken in England showed that imprisonment had no effect on those reconvicted second or third time. However it was found that those who suffered for the first time tried to avoid reconviction. See Nigel Walker supra note 5, Table 6B p.88.
[8] Ibid p.145.
[9] [1985] IMLJ 457

ordinary circumstances petty theft would not attract any immediate sentence of imprisonment. However, when one considers the extent to which the stealing of motor car parts and accessories is rife at the present day, then the courts inevitably must view such an offence as a serious crime. The public is entitled to be protected against such offenders and they are not likely to be protected if lenient sentences are passed.

This is because offenders are not likely to be discouraged by sentences, which do not involve loss of liberty. In the present case an immediate prison sentence consistent with the duty to protect the interests of the public and to punish and deter the criminal is necessary in the premises, a sentence of 18 months imprisonment in addition to the $200 fine is proper in respect of the first offence and in respect of the second offence, a concurrent sentence of two years imprisonment in addition to the $300 would be appropriate.

2.3.2 Retribution: 'Just Desert'

One of the universally accepted aims of imprisonment is to impart retributive justice. This is based on the fulfilment of moral justice, and restoring social equilibrium disturbed by the offender. In order to achieve this aim the offender should suffer so much pain and suffering as is inflicted by him on his victim. Justice and fairness also demands that since the offender has gained an unfair advantage over his victim, he *deserves* and must suffer punishment. The infliction of punishment is also justified on the ground that it is beneficial for society and the most appropriate and fitting return for a moral evil[10].

[10] H.L.Hart, *Liberty and Morality*, Stanford, Stanford University Press (1963) p.59.

The proponents of retributive theory assert that desire for vengeance is felt on two grounds: First, there is need to satisfy the victim's needs for vengeance. The state acting on behalf of the victim, his friends and relatives relieve them from the necessity of vengeance and prevents them from having to resort to private vengeance. Secondly, the aim of punishment is social defence. To attain this aim the public has a need for vengeance. Punishment by the state is socially acceptable outlet for aggressions that would otherwise be repressed and possibly breakout in an unacceptable behaviour[11].

The cases in which retributive justice has played a dominant role are not wanting. In *Reg. v. Sergeant*[12], advocating retributive justice, Lawton L.J. stated:

"It is that society through the courts, must show its abhorrence of sentences they pass. The courts do not have to reflect public opinion. On the other hand, courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. Anyone who surveys the criminal scene at the present time must be alive to the appalling problem of violence. Society, we are satisfied, expects the courts to deal with violence."

Similarly in *Reg. v. Davies*[13], justifying the retributive punishment, Lawton L.J. observed:

"...At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion, I think is not held as strongly now as it was a few years ago. The reason is manifest, the courts have to make it clear that crime does not pay and the only way they can do is by the length of sentences. Sentences show the

[11] K.L.Koh, *Criminal Law in Malaysia and Singapore*, Kuala Lumpur, Malaysian Law Journal Pvt. Ltd. (1989) p.17.
[12] (1974) 60 Cr. App. R. 74.
[13] (1978) 67 Cr. App. R. 207, 210.

courts' disapproval, on behalf of the community of particular types of criminal conduct."

The views expressed in the above cases justifying retributive ends have been accepted in the Malaysian case of *Public Prosecutor v. Chung Kwong Huah*[14] wherein, the accused pleaded guilty to unlawful possession of a revolver contrary to Section 9 of the Firearms (Increased Penalties) Act 1971 and unlawful possession of six rounds of ammunition contrary to Section 3 and punishable under Section 9 of the Arms Act 1960. He was sentenced for two offences to concurrent terms of ten years imprisonment and six strokes, and three years imprisonment respectively. Justifying a retributive sentence, the learned judge of the High Court observed:

"As for retribution, the time has come for the courts to show their abhorrence of offences involving the possession and use of firearms. Something has to be done to curb unlawful possession and use of such weapons before the situation gets out of hand. The public is entitled to be protected and it is not likely to be so protected if lenient sentences are passed."

As mentioned above the retributive philosophy has emerged in modern times in the shape of 'just deserts.' The principle evolved in this philosophy is that severity of punishment should be commensurate with the seriousness of the wrong. The grave offences merit severe punishment and minor offences deserve lighter punishments. Disproportionate punishments are undeserved. The principle is also known as the 'principle of proportionality or commensurate deserts.' The modern concept of principle of commensurate deserts can be traced in the criminal jurisprudence propounded by Cesare Beccaria in his "*Of Crimes and Punishments*" written in

[14] [1981] I.M.L.J. 316.

1764[15]. In this study he stated that punishment should be carefully graded to correspond with the gravity of offences. This principle was founded on fairness. If the penalties were not commensurate with offences, the criminals would indulge in grave offences. This concept got a legislative incarnation in the French Code of 1791[16], and the Bavarian Code of 1813[17].

The main thrust of the desert theory is on the quantum of punishment, where proportionality is the touchstone[18]. In imposing penalty, this theory looks retrospectively to the seriousness of the offender's past crime or crimes. Seriousness depends on the harm done by the act and the degree of the actors' culpability. If the offender has a prior criminal record at the time of conviction, his prior crimes and gravity of the present crime is taken into consideration in awarding sentence. This theory requires that offenders should not be regarded more or less blameworthy than is warranted by the character of the offence. Punishment imparts blame. That being the case, it should be inflicted only to the degree that it is deserved[19].

The theory of 'just desert' appears to have a place in the local cases. In *Loh Hock Seng & Anor. v. PP*[20], the first appellant was sentenced for life and seven strokes of whipping. The second appellant was also sentenced to life and 14 strokes of whipping. They both appealed against sentences and the Public Prosecutor crossed appealed against the inadequacy of sentence.

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[15] Beccaria, *Of Crimes and Punishments*, cited in Andrew von Hirsch, Doing Justice: The Principle of Commensurate Deserts in Sentencing, in Hymen Gross and Andrew von Hirsch, in *Sentencing*, New York, Oxford University Press (1981) p. 243.
[16] H.Donnedieu de vabres, Traite de Dreit Driminal et de legislation comparee (3rd ed. 1943) pp.27-28, cited in Radzinowicz, *Ideology and Crime*, New York Columbia University Press (1966) p.24.
[17] Strafgesetzbunch fur das koenigriech Bairen (1813), cited in Radzinowicz Id. p.23.
[18] Andrew Ashworth, *Sentencing and Criminal Justice*, London, Butterworth (1995) p.70.
[19] Hymen Gross and Andrew von Hirsch, Supra note 15 at p.244.
[20] [1980] 2 M.L.J. 13.

On appeal it was held that in the circumstances of this case imposition of term of imprisonment for life is wholly inadequate as it does not reflect the gravity of the offence, and circumstances of this case against the appellant, his record of previous conviction, and the public interest involved in respect the crime of this nature and a sufficient factor of determining of others ilk. The sentence of death should therefore be substituted for the sentence of imprisonment for life and whipping.

In *Siah Ooi Choe v. PP*[21], the appellant was charged for having abetted an offence under S.406(a) of the Companies Act by inducing a bank through deceitful means to give credit to his company. In determining sentence three other charges of inducing three other banks on three separate occasions to grant credit to his company were taken into consideration. The appellant had an unblemished record before the commission of the present offence.

The court allowed the appeal and held that the extenuating circumstances in the present case were highly exceptional, and were in favour of the appellant.
In the circumstances of this case and in the background of the appellants character and his contribution to the society and country the principle of the 'clang of prison gates' was applied. The principle is that in the case of a man with unblemished record the fact that he has a criminal conviction and finds himself in prison is a very grave punishment and a short term prison term would in certain circumstances suffice. A term of three months imprisonment was adequate in all the circumstances. The sentence of nine months imprisonment was set aside and a sentence of three months substituted.

[21] (1988) 2 M.L.J. 342.

2.3.2 Incapacitation

Another justification for imprisonment is the incapacitation of the offenders from committing further offences. They are restrained physically from infringing the law again as long as they remain incarcerated and thereby the society is protected against their criminality.

Being faced with the rising rates of crime in the United States, President Gerald Ford came out in support of incapacitation and said: "the core of the problem consisted of relatively few persistent criminals... a very small percentage of the whole population. The solution to the problem was to get them off the street."[22] The remarks of President Ford appear to support the exponents of imprisonment. They believe that the crime rate will go down if persons who habitually commit crimes are taken out of circulation and are kept in prison for reasonably long periods because they will not be free to commit more crimes.

Bentham also dealt at considerable length with the subject of incapacitation in his works. According to him, one of the objects of penal justice is incapacitation "prevention of similar offences on the part of the same individual by depriving him of the power to do the like."[23]. Furthermore it is believed that if such convicted persons who are great criminal risks, are taken out of circulation for as long as good conscience and sound policy allow, the level of criminal danger in the community will be lessened[24].

[22] Franklin & Hawkins, *Incapacitation*, New York, Oxford University Press New York, (1995) p.18.
[23] Jeremy Bentham, *The Works of Jeremy Bentham* (1843) Vol.4 pp. 173-248.
[24] Hymen Gross, *Sentencing*, New York Oxford University Press (1981), p.187.

Incapacitation however suffers from some drawbacks. The effect of this incapacitation is limited: with rare exceptions, offenders are eventually released in the community. While the offender may not be able to commit crime in the community, the possibility of crime in prison is a real and continuing problem. Additionally a prison term may well enhance the skills an offender needs to commit crimes in the society[25]. This is particularly true in the cases of first offenders. Moreover, some of those who commit crimes in extenuating circumstances are least likely to repeat the crime. To punish such persons so that they may not commit crime is useless.

2.3.4 General Deterrance

One of the more significant uses of imprisonment is general deterrence. The purpose of general deterrence is to protect the public from the commissions of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.

Jeremy Bentham was the chief exponent of this object of imprisonment. He started with the proposition that all punishment is pain and should therefore be avoided. However, punishment is justified if the benefits (in terms of general deterrence) would outweigh the pain inflicted on the offender punished, and if the same benefits could not be achieved by non-punitive methods. Sentences should therefore be aimed and calculated to be sufficient to deter others from committing this kind of offence, no more, no less[26].

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[25] The Law Reform Commission, Report No. 44, *Sentencing*, Canberra Aust. Govt. Publishing Service (1988), p.24.

[26] See generally, his *Priniciples of Morals and Legislation* (1789).

The rationale behind sentencing is that those citizens are rational beings, who will adjust their behaviour according to the disincentives of penal law.

Nevertheless, deterrence like incapacitation is subject to criticism on several grounds. The main criticism is that the factual data on which the deterrent system must be based does not exist. We lack reliable findings about the relative deterrent effects of various types and penalties for various crimes. For example, various attempts to assess the deterrent efficacy of the death penalty failed to yield clear and reliable results[27]. However in one of the studies conducted in Malaysia on the efficacy of various types of punishment, it was found that most of the members of the judiciary (Magistrates, Session Courts judges and High Court judges) indicated imprisonment as most appropriate form of punishment, for all offences or offenders triable by the respective courts. Many of them were of the view that imprisonment was an effective general deterrence[28].

The courts have always considered the deterrent aspect of imprisonment while imposing sentence. In *Ragunath v. Faria*[29], the petitioner, was convicted of theft of a coconut tree under section 379 of the Indian Penal Code and sentenced to R.I. for 10 days. On appeal to the session court, his sentence was reduced to three days R. Imprisonment with a fine of Rs.50. The petitioner felt aggrieved and moved to the High Court in revision under section 435 and 439 of Cr.P.C. The learned judge of the High Court allowed the petition and held that the object of punishment is prevention

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[27] Hood R. *The Death Penalty: A World Wide Survey*, Oxford University Press cited in Andrew Ashworth, *Sentencing and Criminal Justice* (1995) p.62

[28] Mimi Kamariah Majid, "Disparity in Sentencing"; paper presented at Conference on Sentencing, Bar Council, Kuala Lumpur (1994), p.35.

[29] A.I.R. (1967) Goa 95.

of crime and every punishment is intended to have a double effect, namely, to prevent the person who has committed a crime from repeating the act and also to prevent others from committing similar crimes. What will serve the ends of justice is a deterrent sentence unless, having regard to the nature of the offence and the circumstances in which it is committed, such a sentence is regarded as unsuitable.

In the Indian decision of *Dulla v. State*[30], it was held that a deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, healthy or moral well being of the community, or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be of criminal nature, an act that is not essentially criminal in character, deserves leniency, except in the case of persistent offenders.

Similarly, in the Malaysian case of *P.P. v. Jafa bin Daud*[31], the respondent was charged for being in possession of heroin, an offence under S.12(2) of the Dangerous Drugs Act 1952. He pleaded guilty to the charge and was accordingly convicted and sentenced to eight months imprisonment to take effect from the date of his arrest. The public prosecutor appealed against the inadequacy of sentence and argued that the magistrate had failed to appreciate the seriousness of the offence and also failed to consider that the respondent had five previous convictions, two of which were connected with drugs.

[30] A.I.R. (1985) All. 98; also see *Nanhi Gond v. Emp.* A.I.R. (1927) Nag. 221.
[31] (1981) 1 M.L.J. 315

The appeal court allowed the appeal and held that the learned magistrate had misdirected herself on the facts and the law, and the sentence of eight months imprisonment was manifestly wrong and inadequate as a deterrent for the accused as well as for would be offenders. The learned judge enhanced the sentence from eight months imprisonment to eighteen months imprisonment, to take effect from the date of arrest.

2.3.5 Rehabilitation

Rehabilitation is also regarded as one of the important objects of imprisonment. It proclaims that the principal aim of sending the offenders to prison is to achieve their rehabilitation by subjecting them to correctional treatment. To achieve this aim, sometimes emphasis is placed upon the modification of attitudes and behavioural problems. Sometimes the education and skill is provided with the avowed object that these might enable the prisoner to find occupations other than crime. Hence, the concern of the sentencer is the need of the offender, and not the seriousness of the offence committed[32] alone.

Various criticisms have been levelled against imprisonment when used as rehabilitative technique. One of such criticism is directed on the efficacy of the treatment programmes launched in such institutions. It is said that treatment programmes have not been successful in preventing recidivism compared to those subjects to non-custodial measures. There had been many studies on the effectiveness of such institutional programmes particularly with regard to re-conviction rates in

[32] Andrew Ashworth, *Sentencing & Criminal Justice*, (1995), London, Butterworths, p.66.

subsequent years. The conclusion of such studies was that the treatment programmes did not work well[33].

The other objection is directed towards the rehabilitative policies. These policies increase the powers of prison officials and recognise no right of the inmates of the institution. The release of the prisoners is placed in the hands of such officials usually without firm criteria, clear accountability or reasoned decision making. Even if the crime is minor, an offender may be subjected to the control of the institution for a considerable time if he is diagnosed requiring prolonged treatment. In effect, the offender is considered more as manipulable object than as a person with rights[34].

Despite these objections, it can be said that the rehabilitative approaches adopted in prisons and the like institutions have not been properly tested, and a full commitment to its treatment and re-socialisation programme would result in a more human and viable sentencing system.

2.4 WEAKNESSES

Imprisonment though intended to achieve the prisoners' rejuvenation is said to have unwanted side effects. It is said to provide a form of crude retribution and brutalising cannot be shown to rehabilitate or deter offenders and is detrimental to the re-entry of offenders into society[35]. Some of the factors that have contributed to the failure of imprisonment to achieve the desired objects are given below. They effect not only the long term offenders but also short-term offenders in more than one ways.

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[33] Ibid.
[34] Id 67
[35] Roman Tomesic, *The Failure of Imprisonment*, Sydney, George Allen and Unwin, (1977), p.1.

The short-term offenders undergo all the deprivations in shortest possible time. They are dehumanised more quickly than others.

2.4.1 Damage to Physical Health

Undoubtedly, prison systems effect the health of the inmates of the institution due to malnutrition, insanitary conditions, cold, heat, excessive hard work or inhuman disciplinary measures.

Malnutrition is universally labelled charge against the prison. It is said the food supplied to the prisoners is not very exciting, sometimes not even well cooked, and is not sufficiently nutritious to keep physical health. The lack of proper food gives rise to certain ailments, which go with the prisoners even after their release from prison. The Prison Medical Services of Malaysia and India have not made any effort to determine the effect of imprisonment on the physical health of the prisoners. In the United States, one such effort was made by David Jones in 1976. He compared the medical records of men on probation, on parole and in prison. He found that the per capita rate of recorded acute disorders of most kinds were higher amongst the prisoner than amongst his parolees and probationers and higher than that of the U.S male population for the comparable age groups[36].

2.4.2 Mental Health

Imprisonment is believed to impair mental health. To what extent is this true of the Malaysian and Indian prison system? It is said that imprisonment causes some mental disorders in mentally healthy prisoners due to isolation from the family members. The emotional pressures generated in prison life are strong and have little

[36] Nigel Walker, *Sentencing, Theory, Law and Practice*, London, Butterworths, (1985), p.160.

outlet. The routine is monotonous. There is total deprivation of heterosexual contact, which is enough in itself to produce serious emotional complications[37].

There is no denying the fact that prison life causes mental ailments. Nevertheless, no such study has been made in our countries. One such study undertaken in England estimated that of adult males and females, 2.4, 5.8 and 15.4 percent suffer from neurosis, 8.8 and 16.1 per cent from personality disorders and 1.0 and 2.6 percent from organic disorders.

2.4.3 Deprivation of Liberty

Of all the painful conditions imposed on the inmates of prisons, none is more obvious than deprivation of freedom. The prisoner is confined within the four walls of the institution; his freedom of movement is restricted. He remains in a cell until permitted to move out of it. In short, the prisoners' loss of liberty is double firstly, by confinement to the institution and second, by confinement within the institution[38].

What makes this pain of imprisonment worse is the fact that the confinement of the offender represents a deliberate moral rejection of the criminal by the free community where he has lived. It is the moral condemnation of the offender as a consequence of committing an offence[39].

It is claimed that many offenders are so much alienated from conforming to the rules of society and so identified with criminal subculture that the moral

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[37] Criminal Law and Penal Methods Reform Committee, *Sentencing & Corrections*, (1973), p.62.
[38] Rod Morgon, Imprisonment, in Mike, Rod and Robert (ed.), *The Oxford Handbook of Criminology*, Oxford, Clarendon Press, (1994) p.911.
[39] Gresham Sykes, *'The Pains of Imprisonment'*, in Norman, Johmston (Ed.) The Sociology of Punishment and Correction, New York, John Wiley & Sons (1970) p.447.

condemnation, rejection or disapproval of legitimate society does not effect them; they remain indifferent to the penal sanctions of the free community, at least as far as the moral stigma of being defined as a criminal is concerned[40].

The life inside the prison contaminates the prisoner to such an extent that it is not only a constant threat to the offender's self conception but also works as a daily reminder that he should keep apart from the decent men of the society. This attitude of the society of rejection or degradation must be warded off, turned aside, rendered harmless, if the prisoner is to be readjusted in the free community[41].

2.4.4 Prisons as Schools for Crime

The traditional criticism against prisons is that the prisons are schools for crime. The former President of the United States, Nixon, called the prisons as universities of crime. It is believed that prisons breed criminality. The detention in the company of recidivists makes offenders less abiding in their attitudes. The prisoners' constant contact with the experienced people of the underworld provide them an opportunity to acquire from each other ideas and techniques which lead them into subsequent crimes.

One important question that may be asked in this context is whether an offender who had his orientation as a law abiding citizen when he comes to prison is

[40] Id p.448.
[41] Ibid.

likely to lose it when he leaves the prison. Many studies[42] have been carried out by the sociologists of the ways in which the offenders have become adapted to the subculture of prison. The 'subculture of prison' to some extent comes in the prison from the outside world. Whether the prisoner has assimilated such subculture in his life depends on his own subculture background from where he comes. It also depends on the administration that allows the prisoner to be dominated by powerful and senior inmates, on the frequency of contacts which prisoners are able to maintain with the people of the outside world of their own choice, and it also depends on the period which they spend in any particular institution[43].

One other question that arises in this regard is whether a person who has served many custodial sentences is more likely to be re-convicted. It has been noticed that there is some relationship between long or frequent periods of detention, which increases a man's chances of re-conviction. This may be due to the fact that they become more crime proned during their period of confinement in prison[44].

2.4.5 Overcrowding

Another factor related to imprisonment, which seems to be associated with recidivism (re-conviction), is overcrowding. It has been found that those who had spent most of their period of confinement in overcrowded prisons had re-conviction rates higher than those who were confined in less crowded prisons[45].

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[42] In one such study Wheeler's report showed that in the early stage of their sentence one prisoner's value's were not different from those of their guards but later were found close to the other prison inmates. See Nigel Walker, op. cit. p.166.

[43] Ibid.

[44] Ibid.

[45] This was noticed in a study which was made by Farrington and Nuttal of the prisoners released in 1965 after serving medium or long sentences in 19 English prisons. For details see Nigel Walker op.cit. paraII, p.25, p.167.

This is due to many factors. The prisoner is forced to stay with many other prisoners whose attitudes and values of life may be quite different from his own. Some of such prison inmates will be the men used to violence. Slight disagreements with such prisoners may cause personal danger to him. If he has developed personal dislike against such prisoners- for example due to the violent attitude or the nature of the offender he may be harassed and attacked. The regime does not make proper segregation of the prisoners at least during the daytime. This results in numerous forms of exploitation by the powerful prisoners.

Overcrowding in prison also discourages sentencers to be more selective in their use of prison sentences, and to reduce those, which they would be, obliged to impose in a particular case. It has also given rise to employing of other methods to reduce pressure on prisons such as probation and suspended sentences. The question, how best these innovations can be used as an alternative to imprisonment is a debatable one.

There are penologists who argue that we should not react to prison overcrowding by increasing the capacity in prisons because it will encourage the sentencers to increase the use of imprisonment. This was confirmed in a study made in 1980 in America by Abt. Associates. This study showed that an increase in the penitentiary capacity of the United States was followed two years later, by a corresponding increase in number of prisoners[46].

[46] Nigel Walker op. cit., p.181.

To overcome the crowding in Malaysian prisons, the Prison department has taken positive steps to accommodate evenly prison inmates in some of the 21 prisons and 14 rehabilitation/correctional institutions. Some new prisons have been built. Steps are being taken to convert existing prisons only for remand prisoners (prisoners awaiting trial). This action has to a certain extent helped to redress the problem of overcrowding in Malaysian prisons. This has also made it possible to provide better amenities, facilities and improved prison conditions[47]. In view of present facilities available it is hoped that the courts in Malaysia will not be discouraged from imposing prison sentences in deserving cases. The situation in India is not good. Almost all states in India suffer from the problem of overcrowding in penal institutions. This will be examined in another chapter of this work.

2.5 TYPES OF IMPRISONMENT

The Malaysian and Indian penal statutes divide imprisonment into imprisonment for life, fixed period which may be simple or rigorous and imprisonment in default of payment of fine.

2.5.1 Imprisonment for Life

Imprisonment for life means a sentence of imprisonment for the whole of the remaining period of convicted person's natural life. The penal statutes governing this category of imprisonment as to the period the prisoners are required to spend in prison are not uniform. Some fix it as twenty years while others regard it as the remaining

[47] Arthur Edmonds, "Crime Prevention and Criminal Justice in the Context of Development, The Malaysian Perspective", *Resource Material Series 37* UNAFEI, Fuchu Tokyo Japan (1993) p.181-82; also see Hj. Shardin bin Chek Lah, "Practical Measures to Alleviate the Problem of Overcrowding", *Resource Material Series No. 36*, Ibid.

period of convicted person's natural life. Section 57 of the Malaysian Penal Code[48] provides that imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years[49].

While commenting on S. 57 of the Penal Code, Sir Hari Singh Gaur, the celebrated author of the Indian Penal Code observes:

"Not only for the purpose of calculating fractions of terms but also for the purpose of sentence itself, transportation for life (now imprisonment for life) has now come to mean transportation (imprisonment) for 20 years, the transported convict being on the expiration of that term free to remain in his abode of exile or return home at his pleasure[50]."

However, John D.Mayne[51], another author of Indian Criminal law, disagrees with this view. He is of the view that this section must be strictly limited to calculations of fractions. The sentencing court must regard a sentence of transportation (imprisonment) for life as running throughout the remaining period of convicts' life.

Dr. Gour's interpretation of S. 57 gave the impression that life imprisonment meant imprisonment for twenty years. This impression was cleared by the Judicial

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[48] The Indian Penal Code in Section 57 makes similar provision; S.3 of the Criminal Justice Act (U.K.) (1953) also fixes 20 years for life imprisonment.

[49] It is disheartening to note that about 44 prisoners for life who have spent between 26 and 36 years (exceeding their term of life imprisonment) are behind bars languishing in Malaysian jails. Many of them would have been released after fourteen years on good behaviour. The majority of such prisoners when convicted were juveniles, and the Juvenile Court had no power to sentence them to death or life imprisonment. Hence, the courts ordered to detain them at the pleasure of the Ruler. For detail report see New Straits Times September 15th and 16th, 1997.

[50] Gour, *The Penal Law of India,* Vol.I (4th Edition), Allahabad Law Publishers p.439.

[51] J.D.Mayne, Criminal Law of India (4th Ed.) p.22.

Committee of the Privy Council in *Kishori Lal v. Emperor*[52], where the question to be determined was whether a person lawfully sentenced to transportation (imprisonment) for life and confined in a prison appointed for such person was entitled to be discharged after serving out 14 years imprisonment. Their Lordships of the Privy Council held that he was not entitled to be discharged after 14 years even assuming that sentence was to be regarded as one of 20 years and subject to the remissions for good conduct, but added that their Lordships are not to be taken as meaning that life sentence must and in all cases to be treated as one of not more than 20 years or that the convict is necessarily entitled to remission.

The term imprisonment for life has been given different meanings in some Malaysian statutes, such as The Firearms (Increased Penalties) Act 1971, The Arms Act 1960 and S. 130 of the Penal Code. In these statutes imprisonment for life means imprisonment for the remaining period of the convicted persons' natural life.

In *Che Ani bin Itam v. P.P.*[53], the appellant was convicted in the Sessions Court of an offence under S.4 of the Firearms (Increased Penalty) Act 1971 and sentenced to imprisonment for life and six strokes of whipping. He appealed to the High Court and on the application of the appellant the learned judge stayed the proceedings and certified the following constitutional question for the determination of the Federal Court.

"Whether or not the sentence of life imprisonment for the duration of natural life as provided under S.4 of the Act read with S.2 definition of life imprisonment as

[52] A.I.R. (1945) PC 64-71, I.A.1
[53] [1984] 1 M.L.J, 113.

amended is unconstitutional and violates Art. 5(1) and Art. 8(1) of the Federal Constitution."

Raja Azlan Shah LP said: "...Notwithstanding the provisions of S.3 of the Criminal Justice Ordinance 1953 which provide that a sentence of imprisonment for life shall be deemed for all purposes to be a sentence of imprisonment for 20 years and the amendments made to the Penal Code to substitute provisions for imprisonment for life with imprisonment for a term which may extend to 20 years, there are specific statutory exceptions however categorically providing for imprisonment for life to mean imprisonment for the duration of natural life in certain specified offences such as for example S.130 A of the Penal Code in relation to offences against the State under Chapter VI of the Penal Code and the Arms Act 1960. The sentence prescribed in the Firearms (Increased Penalties) Act is constitutional and valid."

In *Neon Man Lee v. PP*[54], the appellant was convicted of culpable homicide not amounting to murder and was sentenced to life imprisonment, an offence under S.304 of the Penal Code. He was suffering from schizophrenia and had relapses. During the second relapse, he stabbed a woman to death. During the period of his remand he had further two relapses. The trial judge had, in assessing sentence, taken into consideration the history of the accused mental illness and that he had several relapses, and was of the view that a long term imprisonment would protect the public against the accused and the accused would get proper medical care and attention. The accused appealed against his sentence to the Court of Criminal Appeal.

[54] [1991] 2 MLJ 369.

The Court of Criminal Appeal dismissed the appeal and held that a sentence of imprisonment is justified where the offence is itself grave enough to require a very long sentence; or where it appears from the nature of the offence or from the defendant's history that he is a person of unstable character likely to commit such offences in the future. The conditions for sentence to imprisonment for life were clearly satisfied in the present case and justified a life sentence. The appellant was clearly a continuing danger not only to himself but also to the public. He should have been detained as long as it was permissible under the law.

It is submitted in this case their Lordships of the Court of Criminal Appeal failed to take into account the mental state of the accused at the time of commission of the offence. In view of the circumstances, it would have been in the best interest of the individual and the society to make an order for the committal to the lunatic asylum instead of awarding imprisonment.

In India, the expression "imprisonment for life" has been held to denote imprisonment for the full or complete span of life, or whole of the remaining period of the convicted person's natural life[55].

In *State v. Ratan Singh*[56], while defining the expression "imprisonment for life," the Indian Supreme Court stated:

"That a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remission, because the administrative rules framed

[55] In Singapore, it has been ruled by the Chief Justice of the Republic that a convict sentenced to life imprisonment will spend the rest of his life in prison instead of the 20 years that has been the norm for more than four decade-see New Straits Times, August 22nd, 1997.
[56] A.I.R. (1976) S.C. 1552.

under the various manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of the Code of Criminal Procedure."[57]

An analysis of the Malaysian and Indian cases show that they are in line with the English Common Law where the life sentence is wholly indeterminate in the sense that, when the person on whom it is imposed is received into prison, he cannot be given the exact date of release. While a person sentenced to fixed-term imprisonment can be told, on reception, the precise date of his release, if he conducts himself properly, he will be released from prison[58].

However, his release after serving a certain period (for example 14 years) is subject to the consideration of the Prison Review Board[59], or the respective state governments[60].

However, in India a special provision exists to cover the cases of persons convicted of capital offences who are required to undergo a mandatory period of imprisonment for at least 14 years. Section 433 A of the (Indian) Criminal Procedure Code[61] provides that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments

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[57] The case was decided under Code of Criminal Procedure 1898. Now replaced by Act II of 1973. The corresponding provision is 5.432.
[58] Rupert Cross, *The English Sentencing System*, London, Butterworths, (1971), p.36.
[59] In Malaysia the Pardon Board decides the time of release.
[60] In India it is decided by the respective state governments.
[61] This section was added in 1978 by Amendment Act of Cr.P.C.

provided by the law or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least 14 years imprisonment[62].

This provision acts as a restraint on the executive power of the state not to remit the sentence of any convicted person in order to make some political gains. In Malaysia, no such provision exists.

2.5.2. Imprisonment for a Fixed Term

Imprisonment is of two descriptions: simple and rigorous[63]. In the case of rigorous imprisonment the prisoners were put to 'hard labour' such as breaking of metal, grinding of corn, digging earth, drawing water from the well, cutting firewood in the past. Now this unproductive labour is replaced by correctional measures like vocational training and working in agriculture (open jails) colonies or doing work in jail industries. Hard labour now means correctional work in the prisons. In the case of simple imprisonment the offender is confined in jail custody, and such a prisoner is at liberty not to do work. However, for breaking the monotonous prison life he is offered light work.

The penal provisions specifically prescribe whether the sentence will be rigorous or simple for the specified offence. In most of the cases, the offender is liable to either rigorous or simple imprisonment at the discretion of the court. On the other

[62] It is to be noted here that unlike Malaysian Penal provisions, the Indian Penal Code in case of capital offences prescribe life imprisonment as an alternative to death sentence. For example, under Section 302 of the Malaysian Penal Code, the sentence for murder is death, while under Section 302 of the Indian Penal Code, a person convicted for murder shall be punished with death or imprisonment for life.

[63] In India, imprisonment is divided into simple and rigorous while in Malaysia no such division is made.

hand, there are a number of offences where the sentence prescribed is only simple imprisonment[64]. Most of the sentences prescribed in this category are for short term. These short-term sentences are a burden on prison, where no productive work is taken from these short-term prisoners. The presence of these short-term prisoners sentenced to simple imprisonment without any obligation to work, clogs the correctional work in the prisons. They effect the work culture inside the jail. Without contributing anything to prison industry they are parasites on the limited resources of prison funds. Short-term stay does not bring anything good to them rather, they get the status of ex-prisoner when they come out of the prison.

2.5.2.1 Date of commencement of sentence:

The general rule as stated in the Malaysian Criminal Procedure Code (hereafter to be referred as C.P.C) and the Indian Criminal Procedure Code (hereafter to be referred as Cr.P.C)[65], is that a sentence of imprisonment ought to commence from the time the same is passed unless the court passing such sentence otherwise directs. In the light of this provision, the courts in Malaysia and India make orders for

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[64] The following offences are punishable with simple imprisonment only under the Indian Penal Code:

(i) Public servant unlawfully engaging in trade; or unlawfully buying or bidding property. (ss 168, 169).
(ii) A person absconding to avoid service of summons or other proceedings from a public servant or preventing service of summons or other proceedings from a public servant or preventing service of summons or proceedings (ss 172, 173, 174).
(iii) Intentional omission to produce a document to a public servant legally bound to produce such document (ss 175, 176, 187).
(iv) Refusing to take oath when duly required to take oath by a public servant (ss 178, 179, 180).
(v) Disobedience to an order duly promulgated by a public servant if such disobedience causes obstruction, annoyance or injury (s 188).
(vi) Escape from confinement negligently suffered by a public servant of escape on the part of public servant in cases not otherwise provided for (ss 223, 225A).
(vii) Interruption to judicial proceedings (s 228).
(viii) Continuance of nuisance after injunction to discontinue (s 291).
(ix) Wrongful restraint (s 341).
(x) Defamation and knowingly printing or selling defamatory matter (ss 500, 501 and 502).
(xi) Indecent behaviour (s 509).
(xii) Misconduct by a drunken person (s 510).

[65] S.482 (d) of the C.P.C and S.427 of the Cr.P.C.

imprisonment either to commence from the date the offender is arrested or from the date the offender is convicted. The courts make order of imprisonment from the date of arrest where it is found that offender has been in remand for quite long before trial and has suffered pain[66]. The order of imprisonment from the date of conviction is usually made where the date of conviction and sentence differs. This may happen in the case of youthful offenders, who are below the age of 21 years. Those youthful offenders, who are directed by the courts to be detained at the Henry Gurney School, require probation report before such order is made[67]. Sometimes it takes two to three weeks for the preparation of such report. If after the submission of the probation report, the court decides not to send the youthful offender to Henry Gurney School, but to send him to prison, the court may pass an order to commence the sentence from the date of conviction.

These statutory provisions of Criminal Procedure Code have given rise to many questions. The first question that may be asked is what will happen in a situation where an offender is convicted and sentenced to imprisonment for more than one offence at the same trial? Will all sentences of imprisonment be concurrent or consecutive? What is the position of imprisonment in default of payment of fine? Will the imprisonment in default of payment of fine run concurrently or consecutively to the other period of imprisonment?

2.5.2.2 Concurrent and Consecutive Sentences

The accused may be subject to more than one sentence of imprisonment in two situations. Firstly when he is an escaped convict. Secondly when he is already

[66] D.A.Thomas, *Principles of Sentencing*, London, Heinnemann (1979), pp220-221.
[67] See Section 40 of the Juvenile Courts Act, 1947.

undergoing a sentence of imprisonment. In these circumstances if the court decides to impose sentence of imprisonment again for another offence, the subsequent imprisonment shall commence either immediately or at the expiration of the term of imprisonment the offender is already undergoing as the court awarding the sentence may direct[68] the sentences so passed by the court may be made concurrent or consecutive. The word concurrent means "existing or occurring at the same time." Whereas consecutive means following continuously, or successive. In deciding whether to order concurrent or consecutive sentences, the court considers appropriate. Since the court have the choice to order concurrent or consecutive prison sentences, the courts make such order on the principles evolved from English Common Law. These principles are known as single transaction principle or totality principle.

2.5.2.3 Single Transaction Principle

According to single transaction principle "where two or more offences are separately charged and they form part of a single transaction, the court should generally impose concurrent sentences[69]." The offences are said to be part of the same transaction when a series of offences of the same type are committed against the same victim. The rationale of this rule appears to be that consecutive sentences are inappropriate when all the offences taken together constitute a single invasion of the same legally protected interest[70], and therefore excessive punishments are unreasonable.

[68] S. 292 (1) of the C.P.C and S.246(2) of the Cr.P.C.
[69] Andrew Ashworth, op. Cit. (1995) p.256; also see D.A.Thomas op. Cit. p.53.
[70] D.A.Thomas Ibid.

The Single transaction principle is reflected in S.165 of the C.P.C, S.220 of the Cr.P.C[71] and S. 71 of the Penal Code (Malaysian and Indian).

Section 71 of the Penal Code deals with the limits of punishment of offence made up of several offences. This section provides that where anything which is an offence is made-up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment for more than one of such of his offences, unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

The above mentioned section regulates the limits of punishment by distinguishing 'separate offences' from 'distinct offences[72].' This section does not contain a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment and it cannot therefore affect the question of conviction, which relates to the province of procedure[73].

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[71] S. 31 of the Cr.P.C. also lays down the that when a person is convicted at one trial of two or more offences, the court may subject to the provisions of S. 71, sentence him for such offences, to several punishments prescribed therefore which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently, and in the case of consecutive sentences, it shall not be necessary for the court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher court. Provided that (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years; and (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for a single offence.

[72] Ratanlal & Dhirajlal, *Law of Crimes*, (1997) 24th Ed. P.210.

[73] R.C.Nigam, *Law of Crimes in India*, (1964) p.250.

Section 165 of the C.P.C and Section 220 of the Cr.P.C deal with joint trial of separate charges and reads thus:

"If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence."

The C.P.C permits trial for multiple offences committed by the accused separately or during the course of the same transaction or where the different acts each constituting minor offences when combined constitute a major or aggravated form of those minor offences. But when it comes to punishing the offender for these multiple offences section 71 of the Penal code regulates the punishment by restricting it to the maximum term provided for the major offence.

Section 71 is based on the rule that where the intention of the accused to commit an offence, and the commission of such offence involves the perpetration of various acts themselves punishable, the offender should not be punished for them separately, as his object was to commit one offence only[74]. These provisions of the C.P.C and the Penal Code legitimise the authority of the courts to impose concurrent sentences applying the single transaction principle. The offences triable under these provisions will be those offences where the one transaction principle in sentencing may be invoked[75].

[74] Ibid.
[75] Mimi Kamariah, Concurrent and Consecutive Sentences, in M.B.Hooker, (ed.) Malaysian Legal Essays, (1986), p.111.

The court applied the single transaction principle in *Datuk Haji Harun bin Haji Idris & Ors v. Public Prosecutor*[76]. In this case, the three appellants were jointly charged with the offences of forgery and criminal breach of trust. All the appellants were tried at the same trial and the two offences were tried together as they formed part of the same transaction within the meaning of S.170 of the C.P.C. The third appellant, Ismail Din was awarded one year's imprisonment on the charge of forgery and a fine of RM15, 000 or six months imprisonment on the charge of criminal breach of trust. The Federal Court substituted the sentence with one day's imprisonment and a fine of RM10, 000 in default of six months imprisonment for the first charge and a fine of RM16, 000 in default of six months imprisonment for the second charge. The two six months imprisonment were ordered to run concurrently because the two offences were found by the court to be akin and intimately connected with each other. If the fines were not paid, the sentences of imprisonment were ordered to run concurrently. As for the second appellant, Mansor, the three years imprisonment awarded on both the charges were ordered to run concurrently. With regard to the first appellant Datuk Harun, who was the principal actor in this case sentence of 4 years imprisonment for the offence of forgery was ordered to run concurrently with three years imprisonment awarded for the offence of criminal breach of trust.

Similarly, the court applied the one transaction rule in *Lim Yean Yeong v.PP*[77]. In this case, the appellant was tried on three charges, three were for the offence of criminal breach of trust (C.B.T) all committed within twelve months and the remaining charges were subsidiary to the main charge of CBT. He was found guilty of the charges and was sentenced to six months imprisonment on each of the main

[76] [1978] 1 M.L.J 240.
[77] [1940] M.L.J 272.

charges and one subsidiary charge of forgery. He was acquitted on the remaining six charges. The sentence of imprisonment was ordered to run consecutively. On appeal, the sentences of imprisonment for the third charge of CBT and the charge of forgery were directed to run concurrently as both the offences were committed in the same transaction.

The courts have a choice to decide whether to order prison sentences to run concurrently or consecutively; whichever is the choice of the court; it must be made clear. In *Mohammad Akmar bin Mansor v. PP*[78], the appellant had been convicted and sentenced to imprisonment in the first case. In the second case he pleaded guilty to the charge of committing lurking house trespass by night an offence punishable under Section 456 of the Penal Code. The appellant had also pleaded guilty to another charge under S.456 of the Penal Code (the third case). In respect of the second case, the magistrate sentenced the appellant to three years imprisonment, which was to run after he had served his imprisonment sentence for the first case. In respect of the third case, the appellant was sentenced to three years imprisonment, which was to run concurrently with the sentence for the case. The appellant appealed to the High Court against the sentences imposed in the second and third case. There was however no appeal in respect to the first case. The appellant urged the court to impose concurrent imprisonment sentences for all three cases. The prosecution argued that imprisonment sentences for the second and third cases should not run concurrently as the appellant had a string of previous convictions.

[78] Mallal's Digest Vol. 5 (1997) p. 626.

It was held that the circumstances of each case, particularly the nature of the offences and the need to serve the public interest, should be borne in mind when deciding whether to order concurrent or consecutive sentences. In this case the courts referred to the common law and agreed that where several offences are committed in the same transaction and tried together, the sentences imposed for those offences should be made concurrent. Where however two or more distinct offences had been committed, the sentences of imprisonment should not be made to run concurrently. In cases where distinct offences had been committed, sentences of imprisonment should only be made concurrent when an offender has been convicted of a principal and a subsidiary offence.

The same transaction principle is applied by using four tests namely proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design. In respect of the second and third cases, there was proximity of time, unity or proximity of place, continuity of action and continuity of purpose or design. The second and third cases were therefore not distinct offences but were cases which formed the same transaction. Therefore the imprisonment sentence for the second was ordered to run concurrently with imprisonment sentence for the third case.

In the recent case of *Shafaruddin Bin Selengka v. PP*[79], the Court of Appeal considered at great length the following two questions:

(i) When to order concurrent or consecutive sentences; and

(ii) In cases where the accused is undergoing imprisonment, when should his imprisonment begin?

[79] [1994] 3 M.L.J. 750; also see *Sau Soo Kim v.PP* [1975] 2 M.L.J. 134 and *New Truck Shen v. PP* [1982] 1 M.L.J 27.

This case involved three appeals against the decision of the lower courts.

In the first appeal, the appellant (Shafaruddin Bin Selengka) was sentenced to seven years imprisonment and three stokes of the rotan on each of two charges of committing robbery while armed with a deadly weapon, the offences under SS.392 and 397 read with S.35 of the Penal Code. The sentences were ordered to run concurrently. The appellant appealed against the sentence imposed by the sessions court judge of seven years for each of the first and second charges. The prosecution in appeal asked the court for the sentences to run consecutively.

In the second appeal, the appellant (Rahim Bin Baidi) was convicted of gang robbery under S.395 of the Penal Code and sentenced to 10 years imprisonment plus five strokes of the rotan. At the time of his conviction he was undergoing a previous sentence of seven years and six strokes of the rotan. The sessions court ordered that the ten year imrisonment to run concurrently with the term he was serving at the time of conviction. The appellant urged the court that he needed 'Kasih sayang dan Bantuan'.

In the third appeal, the appellant (Azhar Bin mohd. Nor) was convicted under S.377B of the Penal Code on a charge of committing carnal intercourse against the order of nature and under S.354 for assault with intent to outrage modesty. On the first charge he was sentenced to 15 years imprisonment and for the second offence five years imprisonment. The sentences imposed in the two cases were ordered to run concurrently. These concurrent sentences were ordered to start after the accused had completed his sentence in an earlier case of 12 years imprisonment for an offence of buggery with an animal under S.377 of the Penal Code. The appellant urged the court

to backdate his sentence to the date of his arrest. He further submitted that the sentence of the previous case will end on 25 March 2001 and so if this present sentence were then to begin, he will have to serve in prison until 25 March 2011. In all he would have to serve 29 years and six months which was very long.

Dismissing the appeals the court, held that if the prosecution considers a sentence insufficient and wants it increased or enhanced, the legal course would be to appeal. It was not proper for the prosecution to ask for consecutive sentence at the hearing of the appellant's appeal. In the first appeal, having considered the fact that what actually occurred was one robbery against two persons, the court confirmed and maintained the sentences on concurrent basis.

With regard to the second appeal, the learned judge ordered the prison term to start from the time his present term ends, as he believed the order to start prison term immediately would negate the provisions of S.292(ii) of the C.P.C[80]. In the third appeal it was held that the court was concerned with the third appellant's claim that he has a son to take care of, and it was also concerned for the psychological effect his crime has had on the 15 year old girl he had molested. Therefore, under S.292(i) of the C.P.C, the sentence should begin at the expiration of his previous sentence. The other factors taken into consideration were the type of crimes committed and the hope that imprisonment term would enable some medical treatment to be given to him to curb his lust and help him reform.

[80] S.292(i) of the C.P.C. that nothing in the last preceding section shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

Under Section 427 of the Indian Code of Criminal Procedure 1973, the ordinary rule is that when a person is undergoing a sentence of imprisonment and is subsequently sentenced to another term of imprisonment, such imprisonment shall commence at the expiration of the sentence of imprisonment which was imposed upon him in the previous case. It is for the court dealing with the subsequent case, if it feels called upon to do so to pass an order that sentence should run concurrently with the previous sentence. If no such order is passed, the law takes its course.

Besides this provision, Section 397 of the Cr.P.C. also gives wide powers to the Sessions court or the High Court in its revisional powers to consider the propriety of sentence.

In *Jadu v. State of Orissa*[81], an application under S.482 of the Cr.P.C[82]. was made for the release of the petitioner, who was undergoing sentences on account of conviction in different trials. In all the cases, while sentences were imposed, no orders were passed directing those sentences to run concurrently. In this case the petitioner prayed that since he has already spent nine years in jail he should be released treating the sentences as concurrent instead of consecutive. This was resisted by the additional standing council that since no directive had been made at the time of passing judgements for the sentences to run concurrently such order should not be made.

It was held that the provisions under S.427 are specific. It is undoubtedly the intention of the legislature that ordinarily the sentences imposed on a convict in different cases are to run consecutively unless direction is issued to the contrary. It is

[81] (1992) Cr.L.J. 2117.
[82] The provision recognises the 'inherent powers' of the High Court to pass any appropriate order in the interest of justice.

also correct to state that a criminal court after passing the judgement having become functus officio can no more pass an order directing the sentence to run concurrently unless the same has been passed at the time of judgement. However, the power of the High Court is not in any way fettered by S.247 of the Cr.P.C. to give a suitable direction in the event the court feels that in the interest of justice, the sentences should run concurrently. In the instant case the accused has been convicted in series of dacoity cases, and from the nature of the cases it could be said that he had a propensity to commit dacoity. For such a reason, ordinarily the inherent power should not be exercised for his benefit. It was however shown that all the occurrences in respect of which the accused was convicted took place in a period of one year and two months, about eight years ago. Since a long time has elapsed in between, it may reasonably be expected that the accused, if once released would not indulge in similar offences and would rather choose a more acceptable means of livelihood. The purpose of conviction and sentence is never retaliatory but is reformative in nature. Moreover, there has been no report against the conduct of the accused during his incarceration. It would be reasonable to assume that if the accused is given a chance to return to the main stream of life, he would make an effort to adapt himself to the society in a meaningful and new possible manner. The sentences imposed on the petitioner were treated by the learned judge as concurrent to the extent of the sentences as already undergone by him and he was ordered to be released.

2.5.2.4 The Totality Principle

The totality principle applies in those cases in which an offender is subject to more than one sentence for the offences, which do not form part of the same transaction. The principle requires from the trial courts to pass sentence for all such offences according to the merits of the case. In doing this, the sentence of each of the

offences are added up to make a total and reviewed whether in totality they are appropriate. If the court finds so, it will order consecutive sentences, if it does not find so, it will order the sentence to run concurrently[83].

Where in totality the sentences appear to be excessive and it appears necessary to make some adjustment in the sentence, it is advisable to make the adjustment by ordering sentences to run concurrently rather than reducing the length of sentences and allow them to remain consecutive[84].

The application of the principle stated above can be seen in *Hyder v. R*[85]. In this case the District Judge had convicted the appellant on two charges and sentenced him to six months rigorous imprisonment on each charge. On record, the sentences were consecutive, but in his grounds of judgment, the learned district judge stated that he ordered the two sentences to run concurrently. On appeal, it was held that sentences should not be ordered to run consecutively unless there were good reasons for doing so.

In *Wong Yuk Ai v. PP*[86], the appellant had previously been convicted and sentenced. Subsequently he was charged with an offence under S.182 of the Penal Code and was sentenced to six months imprisonment. The learned magistrate ordered the sentence to run concurrently with the sentence the appellant was serving.

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[83] Thomas op. cit. p.56.
[84] Id. at 57.
[85] [1949] M.L.J. 121.
[86] (1966) 2 M.L.J. 51.

On appeal, it was held that whether sentences imposed should run concurrently or consecutively is a matter for the discretion of the court, but such discretion must be exercised judicially. It is not unusual for a court to direct sentences for two or more offences to run concurrently when the sentences are passed at one and the same trial.

In this case, the appellant was undergoing imprisonment and the subsequent sentence should commence only on the date of conviction or on the expiry of his imprisonment. It is not possible for the court to direct the subsequent sentence to run concurrently with the same sentence which, the appellant was already serving in view of S.420 of the C.P.C[87].

Like the Malaysian courts, the Indian courts have also applied the English common law totality principle when imposing concurrent or consecutive terms of imprisonment. In *Sooraj v. State*[88], the accused was convicted of the offences punishable under S.302 and 201 of the Indian Penal Code. The sentences imposed by the additional sessions judge were challenged by the accused in appeal. In the revision, the accused prayed for an order to direct the above sentences to run concurrently with the sentences awarded to him under S.380 and 457 of the I.P.C. by the Judicial Magistrate. It was held on appeal that the power conferred on the courts under S.427 (1) to order concurrent summing of sentences is a discretionary power guided by judicial framework. The court has to consider the totality of sentences,

[87] S.420 of the C.P.C provides that when a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct.
[88] (1994) Cr. L.J. 1155.

which the accused has to undergo if the sentences are to be consecutive or concurrent. The totality principle has been accepted by the courts as a correct principle for guidance in this matter. The maximum sentence awarded in one case against the same accused is a relevant consideration. Thus where the accused was awarded two years imprisonment in earlier case and life imprisonment in subsequent case, the principle of totality being applicable, the accused would be entitled to the relief of having both sentences run concurrently.

An analysis of the Malaysian and Indian statutory provisions show that the consecutive sentences are the rule and the current sentences are the exception. So normally the courts will order consecutive sentences but if the circumstances of the case permit, the courts have been conferred a discretion to order concurrent sentences[89].

The discretion to order concurrent sentence must depend on some sound principle and is not meant to be exercised in an arbitrary manner[90]. Before exercising such discretion, the court should look into the facts of the case, the nature and character of the offences committed, the prior criminal record of the offender, his age, profession, sex, etc[91]. It would be proper exercise of discretion in those cases in which, the court makes an order of sentence on a subsequent conviction to run concurrently with the previous sentence where separate trials are held for offences which constitute distinct offences, which are intimately connected with each other[92].

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[89] R.V.Kelkar, *Crminal Procedure*, Lucknow, Eastern Book Co. (1993) p. 513..
[90] Ibid.
[91] Ibid.
[92] See Mulaim Singh v. State (1974) Cr. L.J. 1397.

The discretionary power conferred by S.427 of the C.P.C can be exercised either by the prosecution or the accused by bringing to the notice of the court imposing a subsequent conviction that the accused is already serving sentence of imprisonment. If this fact has not been brought to the notice of the court before it passes the sentence in the subsequent case the court becomes functus officio. Discretion cannot be exercised after the sentence has been imposed[92A]. If the accused applies to the court to pass an order directing that the present imprisonment be made concurrent with earlier sentence, such direction would amount to alteration of judgement which is not permitted by S.362 of the Cr.P.C[93].

The question as to whether the court can issue directions of the type stated in S.247 of the Cr.P.C. (Corresponding to S.397(i) of the Cr.P.C 1898) after the final order of judgment was the subject for decision by the Allahabad High Court in *Mulaim Singh v. State*[94]. The High Court held that the stage for the exercising the discretion is when the court records the conviction and inflicts punishments on the accused. The discretion under S.397(i) of the Cr.P.C. can also be exercised at the stage when the court records the subsequent conviction.

On the question whether the High Court can direct a subsequent term of imprisonment to run concurrently with an earlier term under its inherent powers, the court held that it would be competent for the High Court in exercise of its inherent power to direct that the sentence under a subsequent conviction, to imprisonment may run concurrently with the previous sentence even if the stage for exercise of discretion

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[92A] *Gopal Dass v. State*, 1978 Gil. J 961, 963 (Del. HC)

[93] S.362 of the Cr.P.C. prohibits the court to alter its final order or judgement except to correct a clerical or arithmetical error.

[94] (1974) Cr.L.J. 1397.

under S.397(i) of the Code is over in circumstances, where it would serve any of the three purposes mentioned in the section i.e. to give effect to any order under the Code or to prevent the abuse of the process of the court or otherwise to secure the ends of justice.

2.6 IMPRISONMENT IN DEFAULT OF FINE

The criminal laws of Malaysia and India confer general powers on the courts to award the sentence of imprisonment in default of payment of fine. Such sentence of imprisonment shall be in addition to any other imprisonment to which the offender may be liable to be imposed[95]. The term for which the court may order the offender to be imprisoned in default of payment is stated in the C.P.C and Indian Penal Code[96]. Thus if the offence is punishable with imprisonment and where the maximum term of imprisonment does not exceed six months, the period shall not exceed the maximum term of imprisonment. Where the maximum term exceeds six months but does not exceed two years, the period shall not exceed six months, whereas if the maximum term exceeds two years then the period shall not be more than one quarter of the maximum term of imprisonment.

If the offence is not punishable with imprisonment and it is punishable with fine only, the term the court shall direct, in default of payment of fine shall be in accordance with the following scale. - For a term not exceeding two months, the fine is twenty-five ringgits in Malaysia, and fifty rupees in India; while, for a term not exceeding four months, the maximum amount of fine shall be fifty ringgits in

[95] S.283 (i)(b)(4) of the C.P.C and S.64 of the Indian Penal Code
[96] S.283 (i)(c) of the C.P.C and SS.65 and 67 of the Indian Penal Code

Malaysia and one hundred rupees in India; whereas, if the term does not exceed six months, the minimum amount imposed is fifty ringgits[97].

The order of imprisonment in lieu of fine stated above shall not under on C.P.C be made where time is allowed for the payment of such fine or unless it appears to the court that such person has no property or insufficient property to satisfy the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment[98]. No corresponding provision exists under Indian law.

The sentence of imprisonment in default of payment of fine is in excess of any other imprisonment to which the offender may be sentenced. However, it is not clear whether the sentence of imprisonment should run concurrently or consecutively with the main prison sentence, if it is imposed. Section 102 provise (c) of the Subordinate Court Act guides us in this regard. According to this provise, when sentence or imprisonment is imposed in default of payment of fine or compensation or costs are ordered in any authority of law for the time being in force, the imprisonment shall be consecutive to any term or terms of imprisonment so and to other sentence of imprisonment that may be imposed by the court. Section 283(i)(b)(4) of the C.P.C and S.64 of the Indian Penal Code empower the court to order that imprisonment shall be in excess of any other imprisonment, which term of imprisonment shall be in excess of any other imprisonment that may be imposed. In this regard when an offender is directed to undergo a sentence of imprisonment in default of payment of fine, the rule of consecutive enforcement of sentence shall apply. Section 31 of the Cr.P.C also provides that when a person is convicted at one trial of two or more offences and is

[97] S.282 of the C.P.C and S.67 of the Indian Penal Code
[98] S.283 (i)(b) (4) of the C.P.C

sentenced to a term of imprisonment of each of the offences, the normal rule is that the sentences should run consecutively. However, the court has the power, while passing sentence to direct that sentences should run concurrently. But, this does not apply to a sentence of imprisonment in default of the payment of fine and such sentence cannot be ordered to run concurrently with a substantive sentence of imprisonment[99]. In the light of a statutory provisions the courts are of the view that even though it is not mentioned whether the sentences were to be concurrent or consecutive, the sentences are consecutive[100]. It is submitted that it is a clear from the bare reading of the provisions of the C.P.C and Indian Penal Code, dealing with imprisonment and punishment of fine that these types of punishments are two distinct punishments. Where the court imposes a sentence of imprisonment in default of fine, such a prison term will be consecutive to the other prison term which the accused has been ordered to undergo.

A relevant Malaysian case relating to imprisonment in default of fine is *Public Prosecutor v. Pontian Bas Berhad*[101]. In this case the respondent was charged in the Magistrate's court for an offence under 16(i)(c)of the Employees Provident Fund Act 1951 for the failing as an employer to remit contributions in respect of four of its employees. The manager of the company who was present in the court, pleaded guilty to the charge and a fine totalling $4,320 was imposed. This fine was paid. The magistrate also made an order under S.16A (4) of the Act for the respondent company to pay the arrears of contributions to the E.P.F. Board amounting to $28,325. The respondent company failed to pay the arrears. A grace period of two months was

[99] (1967) Cr. L.J.1180
[100] See Behari & Ors v. State, (1953) Cr.L.J. p.1222
[101] (1988) 2M.L.J. 530; This case was subsequently referred in *P.P. v. Kasihku Sdn. Bhd.* (1991) 3 M.L.J.116

allowed, but the respondent company failed to pay such arrears. Thereupon, the magistrate acting under 16A(4) of the Act committed the manager to ten months imprisonment for default of payment of arrears. He imposed this sentence by invoking S.283 (i)(b) (4) of the C.P.C.

The respondent appealed against this decision of the magistrate to the High Court which allowed the appeal and set aside the order of the committal by the learned Magistrate.

The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court: Whether the learned judge was right in law holding that S.283(i)(b)(4) of the C.P.C can have no application in the enforcement of an order made by the court for payment of arrears contribution pursuant to S.16A(4) of the Employees Provident Fund Act 1951.

The Supreme court referred to S.16A(4) of the Act and held that this section states in clear terms that the arrears of contribution "shall be recoverable in the same manner as a fine." For the purposes of recovery, arrears of contribution are to be treated in the same manner as any fine imposed as punishment for a particular offence.

Imprisonment in default of payment of fine does not release the offender from his liability to pay the fine imposed on him. Such imprisonment is not to be

considered as a discharge of the fine but is to be regarded as a punishment for non-payment or contempt to the due execution of the process of the court[102].

The imprisonment in default will cease to exist when either the fine is paid or levied by the process of law; and if a portion of the fine be paid during imprisonment, a proportional abatement of the imprisonment will take place[103]. The fine or any part thereof which remains unpaid, may be levied at any time, within six years after the passing of sentence, and if, the offender is under sentence, since he is liable to imprisonment foe a longer period than six years, then at any time previous to the expiration of that period. In both these cases the death of the offender does not discharge from the liability any property which would after his death be legally liable for his debts[104].

The limitation of six years may only save the property of the accused and not his personal arrest. The liability for any sentence of imprisonment imposed in default of fine continues after the expiry of six years[105].

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[102] *Ramaswamy Iyer v. Union of India*, A.I.R. (1963) Bom. 21; *Vaman Sheney v. Collector of South Kanara*, A.I.R (1964) Mys.64

[103] Ratanlal & Dhirajlal, *Law of Crimes*, (1997) New Delhi, Bharat Law House p.203

[104] S.283 (i)(5)(g) of the C.P.C and S.70 of the I.P.C

[105] *Harnam Singh v. State*, A.I.R 1975 SC 236

2.6 CONCLUSION

In all modes of punishments imprisonment occupies an important place as it is the only punishment which is used against a large number of criminal population of the country.

As it has been observed from the decided cases that the sentence of imprisonment is and will continue to be an important part of the system of punishment for most of the offences in Malaysia and India. Justice require that the seriousness of some offences be matched by a severe punishment. For some serious offences, it is the only just punishment. To remove imprisonment as a sanction would leave the criminal justice system without a punishment of the degree of severity appropriate to some crimes. However, to achieve desired goals of criminal justice such as deterrence, retribution and rehabilitation, it should be properly used and selectively applied.

The sentence of imprisonment takes effect from the time it is passed by the court. However, the courts have been given discretion to impose sentence of imprisonment either to commence from the date of arrest or date of conviction. The courts are also confronted with the issue of sentencing when an accused is charged with more than one offence and the courts decide to impose sentence of imprisonment for all such offences likely to have been given a choice either to order concurrent or consecutive sentence makes a lot of difference on the future prospects or reformation and rehabilitation of the offender. The courts should keep in view the nature of the

offences and the need to serve the public interest when making an order of concurrent or consecutive prison sentences.

Imprisonment in default of fine is awarded when fine is not paid. It is submitted that the courts should be slow in sending the defaulters to prisons. The persons who are genuinely unable to pay the fine should not be sent to prison; sufficient time should be allowed for the payment of the fines, say by instalment.

Short-term sentences do not serve useful purpose in the society. Short stay in prison with consequent stigma and unhealthy association with hard core prisoners reinforce his criminal tendencies and impede the possibility of his successful integration after his release in the community. It is, therefore submitted that short term sentences should be replaced with some non-custodial measures such as probation, suspended sentences, community services programmes and the like.

CHAPTER THREE

SHORT-TERM IMPRISONMENT

3.1 INTRODUCTION

There is no denying the fact that imprisonment is society's ultimate penalty to combat the rising criminal population. It has come to stay with us and will stay until some other alternative methods of punishment are being fully utilised. As we have observed earlier the object of imprisonment is to meet the contemporary demands of deterrence, retribution, and rehabilitation. Now the question arises whether imprisonment can achieve these objectives of criminal justice system? The fact is that a majority of offenders in our prisons are short-termers. They are sent there for periods ranging from one day to six months. The ill effects of short-term imprisonment on the first offenders who are not dangerous and are not guilty of serious offences are clear. They are subjected to the worst impact of imprisonment and forced to live in the company of all sorts of professional and hardcore criminals. The objectives of punishment are not achieved when an offender is sent to prison for a short period. Such a short period of incarceration does not in any way help in the rehabilitation programmes rather it brings social stigma and thereby hampers their readjustment to the community.

In this chapter, it is proposed to make an appraisal of short-term imprisonment and its implications on prevention of crimes and treatment of offenders. The issues dealt with such matters as financial implications, overcrowding and incidence of crime.

3.2 SHORT-TERM IMPRISONMENT AND FINANCIAL IMPLICATIONS

Imprisonment is one of the most expensive ways of disposing a convicted offender, not only in terms of custodial cost, but also in the loss of the confined person's productivity and support for his dependants. It is estimated that the cost of keeping a person in prison is twenty times more than placing him on probation or making him work out a community service order[1].

The cost of maintaining prisoners is enormous. The Malaysian prisons spent RM15.7 million in the year 1993 only on the feeding of the prisoners[2]. The other expenses involved in constructing prison spaces and housing prisoners is much higher[3]. Since the Penal institutions claim big chunks of the funds, the cost could be greatly reduced if short-term imprisonments are avoided and are replaced by other non-institutional measures. This would lead to a restriction on the numbers incarcerated or to a firm restriction on the conditions to be fulfilled before

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[1] James Morton, *A Guide to Sentencing*, London, Waterlow Publishers, (1990), p.1.
[2] See Malaysian Law News, January 1994, an interview with Director General of Prisons of Malaysia.
[3] In the United Kingdom, it costs £33,888 a year to keep a male prisoner in prison and £30,417 a year to keep a female prisoner in prison. A new prison costs £90 million to build. This cost is equal to that of building two hospitals or 60 primary schools. See Leslie James, "Justice without Retribution", *Justice of the Peace* May (1997) p. 502.

incarcerating an offender, with the result that the custodial population would be smaller and less of a drain on the financial resources of the government[4].

3.3 SHORT-TERM IMPRISONMENT AND OVER CROWDING

Short-term imprisonment results in overcrowding the prisons thereby making it difficult to the prison authorities to implement effectively reformative and rehabilitative measures. Prison overcrowding has been a persistent and pressing problem confronting correctional administrators in many countries of the world. However, solutions to this thorny problem are not easy and could not be found by the strategies of the correctional administrators alone. All the components of criminal justice administration, the police, the prosecution, the judiciary and correctional organs have a role to play in an integrated approach to formulate countermeasures to reduce pressure on the over-populated and under-facilitated penal institutions.

Overcrowding in prisons may have different meanings to different countries. Some developed countries use criteria such as minimum floor space, cubic content of air ventilation and other basic amenities to measure overcrowding. While some other countries view overcrowding as gross overcrowding, a situation which is glaring and sometimes disgraceful. In some countries in Asia such as Sri Lanka[5] and Thailand[6]

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[4] Andrew Ashworth, *Sentencing and Penal Policy*, London, Wiedenfield and Nicolson (1981) p. 351.
[5] In Sri Lanka, the average rate of overcrowding has been over 500 percent. See *Resource Material No.36* UNAFEI(1989) p.13
[6] In Thailand, the stipulated capacity of all correctional institutions is 40,000 inmates, yet 64,996 prisoners have been detained. For detailed discussion see Daves Choosap, "Innovation in Criminal Justice in Thailand", *Criminal Justice in Asia*, UNAFEI (1982) p.314.

the problem is so grave that it is reaching a critical level. The overcrowding problem in Malaysian prisons is not much different from some other countries. The prisons in Malaysia were originally built to accommodate 200-600 prisoners but now some of the old prisons like Taiping, Penang and Johor Bharu have 2000-4000 prisoners[7]. The situation in India is similar to Malaysia. The total capacity of Indian prisons is for 167,326 prisoners[8], but there are more than three times that numbers in the prisons. For example, Delhi's Tihar Jail has the capacity to accommodate 3000 prisoners but there are more than 9000 prisoners[9].

Overcrowding in penal institutions means more than just shortage of accommodation for the inmates. It creates unhealthy climate, affects penal reformation, creates security problems, contributes additional pressure on staff and gives rise to tension between staff and inmates.

Overcrowding causes numerous adverse effects, which have related chain reactions. Increasing prison population and consequent overcrowding are hindrances in the observance of the Standard Minimum Rules for the Treatment of Prisoners[10]. Overcrowding in prisons makes it nearly impossible to keep separate the short-termers and first offenders from hardened criminals. A prison sentence becomes

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[7] H.J.Shardin bin Chik Lah, "Practical Measures to Alleviate the Problem of Overcrowding", *Resource Material No. 36*, UNAFEI (1989) p.235.

[8] At present in India, there are 85 Central Prisons, 250 District Jails, 740 Sub jails, 6 Women Prisons, 17 Juvenile jails and 19 Open Prisons. 12 Women Jails and 34 Special Institutions. See "Prisons in India" 1992-1993.

[9] M.S.Rahi, "Judicial overview of Prisons in India", *Criminal Law Journal* (1997) p.47.

[10] The first United Nations Congress on the Prevention of Crime and Treatment of Offenders adopted the Standard Minimum Rules for Treatment of Prisoners. These rules were approved by the Economic and Social Council of United Nations in its resolution of July 31st, 1957.

counter productive for petty offenders, as their association with the most experienced people of the underworld makes them worse when they are released from prisons.

3.4 SHORT-TERM IMPRISONMENT AND INCIDENCE OF CRIME

Short-term imprisonments are not only aimless but also dangerous because prisons provide an ideal environment to the petty offenders for further training in their criminal career. Henting[11] rightly pointed out the adverse effects of short-term imprisonment in the following words:

"These short-terms of imprisonment have no securitive function; the period is otherwise much too short to allow of an earnest educative effect or even if only training for a profession. But this period is also quite sufficient to infect the condemned with the seeds of moral contagion and discharge them into liberty as previously convicted after the comparatively well equipped buildings and relatively good treatment have robbed them of their fear of prison. Due to these drawbacks in short-term imprisonment, it has been suggested that as far as possible, short-term sentences should not be passed. As far back as 1919-20, the Hague convention made recommendation against short-term sentences"[12].

[11] Quoted in Chabbera: *Quantum of Punishment in Criminal Law in India* (1971) Chandigarh Punjab University Press p.158.
[12] See Ahmed Siddique, *Criminology*, Lucknow, Eastern Book Co. p.244.

It is estimated that the majority of prisoners in India are serving less than six months imprisonment. Such short-termers in Indian prisons were found to be 66% in 1911 and 87% in 1961. These figures of 1911 and 1961 show that the trend is in favour of short-term imprisonment[13]. In Malaysia the situation is not much different as illustrated by the tables[14] given below:

TABLE 3.1 SHORT-TERM SENTENCES UNDER VARIOUS PROVISIONS OF PENAL CODE (1993-1995)

PENAL CODE OFFENCES	1993	1994	1995
109-120 = Offences of Abetment	2	1	2
120A-120B = Offences of Criminal Conspiracy	0	0	0
121-130 = Offences against the State	0	0	0
131-140 = Offences relating to the Armed Forces	0	2	2
143-160 = Offences against the Public Tranquillity	14	23	11
161-171 = Offences by/relating to Public Servants	17	7	29
172-190 = Contempts of the Lawful Authority of Public Servants	12	20	13
193-229 = False evidence and offence against Public Justice	8	26	8
231-263 = Offences relating to Coin and Government stamps	2	1	1

[13] Ibid.

[14] Prisons Department of Malaysia Annual Reports 1993, 1994 and 1995.(see tables given in appendix)

PENAL CODE OFFENCES	1993	1994	1995
264-267 = Offences relating to Weights/Measures	0	0	0
269-294 = Offences affecting the Public Health/ Safety/ Convenience/ Decency/ Morals	6	3	28
295-298 = Offences relating to religion	15	13	4
302 = Murder	0	0	3
304 = Culpable homicide not amounting to murder	4	6	6
304A = Causing death by rash or negligent act	4	3	2
305 = Abetment of suicide committed by a child/ insane or delirious person/ an idiot/ a person intoxicated	0	0	0
306 = Abetting the commission of suicide	0	0	0
307 = Attempt to murder	0	1	0
308 = Attempt to commit culpable homicide	0	0	0
309 = Attempt to commit suicide	0	0	1
312-318 = Offences of the causing of miscarriage; of injuries to unborn children; of the exposure of infants; and of the concealment of births	0	4	1
323-338 = Offences relating to voluntarily causing hurt or grievous hurt	80	98	113
341-348 = Offences of wrongful restraint and wrongful confinement	0	0	5
352-358 = Offences of criminal force and assault	24	35	28
363-369 = Offences of kidnapping or abduction	0	0	2
370-374 = Offences of slavery and forced labour	1	0	4
376 = Rape	0	1	1

PENAL CODE OFFENCES	1993	1994	1995
377 = Unnatural offence	1	1	2
377A = Outrage on decency	0	0	17
379 = Theft	254	428	283
380 = Theft in a building/ tent/ vessel	318	436	303
381-382 = Other types of theft	36	50	119
384-389 = Various offences of extortion	2	5	15
392 = Robbery	20	11	19
393 = Attempt to commit robbery	2	5	3
394 = Robbery with causing hurt	1	4	2
395 = Gang robbery	1	0	0
396 = Gang robbery with murder	0	0	0
397 = Robbery with arms or with attempt to cause death or grievous hurt	4	7	0
399-402 = Conspiracy to commit gang robbery	0	1	2
403-404 = Offences of criminal misappropriation of property	8	7	2
406-409 = Offences of criminal breach of trust	12	11	16
411-414 = Offences of the receiving of stolen property	74	81	106
417-420 = Offences of cheating	10	25	6
421-424 = Offences of fraudulent deeds and disposition of property	0	0	0
426-440 = Offences of committing mischief	12	9	15
447-462 = Offences of criminal trespass	113	228	198
465-489D = Offences of forgery relating to documents and to currency notes and bank notes	4	13	6

PENAL CODE OFFENCES	1993	1994	1995
491 = Criminal breach of contracts of service	0	0	1
493-498 = Offences relating to marriage	0	0	0
500-502 = Offences of defamation	0	0	0
504-510 = Offences of criminal intimidation, insult and annoyance	11	12	23
511 = Attempt to commit offences	3	9	0
TOTAL	1075	1587	1398

Source: Table constructed on the basis of data supplied by Prison Department, Kuala Lumpur Malaysia (1997).

The majority of short-termers were involved in theft and burglary in all the three years. Next came the offences of criminal trespass followed by offences of receiving stolen property, then followed by offences relating to hurt and grievous hurt. Offences of short-term sentences for theft and burglary are made up of 53%in 1993, 54% in 1994 and 42% in 1995, and for criminal trespass constitute 10.5% in 1993, 14.4% in 1994 and 14% in 1995; while those for receiving stolen property are composed of 7% in 1993, 14% in 1994 and 8% in 1995. Lastly, the offences under hurt and grievous hurt constitute 7% in 1993, 6% in 1994 and 8% in 1995.

It is evident that majority of short-termers for Penal Code offences are involved in property offences and they are the offenders who go for easy money. They cannot be put to long term correctional measures due to their short stay in prison. It would be more sound policy to engage them in non-institutional corrective measures.

TABLE 3.2 SHORT-TERM SENTENCES UNDER FIREARMS (INCREASED PENALTIES) ACT, 1971

FIREARMS (INCREASED PENALTIES) ACT, 1971	1993	1994	1995
Sec. 3 = Discharging a firearm in The commission of a scheduled offence	0	0	0
Sec. 3A = Being an accomplice in case of discharge of firearm	0	0	0
Sec. 4 = Exhibiting a firearm in the commission of a scheduled offence	0	0	2
Sec. 5 = Having a firearm in the Commission of a Scheduled offence	0	0	0
Sec. 6 = Exhibiting an imitation firearm in the commission of a scheduled offence	7	11	4
Sec. 7 = Trafficking in firearms	0	1	0
Sec. 8 = Unlawful possession of Firearms	8	15	19
Sec. 9 = Consorting with persons Carrying arms	0	0	2
TOTAL	15	27	27

Source: Table constructed on the basis of data supplied by Prison Department, Kuala Lumpur Malaysia (1997).

Most of the offences committed under Firearms (Increased Penalties) Act included the offence of unlawful possession of firearm, exhibiting firearms in the commission of a scheduled offence, exhibiting an imitation firearm in the commission of scheduled offence and consorting with persons carrying arms. The total number of offenders convicted for various terms of imprisonment were 95 and the short-termers comprise 17.2% in 1993, 31.4% in 1994 and 28.4% in 1995[15].

[15] See table in Appendix.

This percentage is quite significant. Despite the seriousness of the offences the courts did not hesitate to pass short sentences on convicted offenders.

TABLE 3.3 SHORT-TERM SENTENCES UNDER DANGEROUS ACT

DANGEROUS DRUGS ACT, 1952 (REVISED 1980)	**1993**	**1994**	**1995**
Sec. 6 = Possession of raw opium/ coca leaves/ poppy-straws/ cannabis	140	151	162
Sec. 6B(1)(a) = Planting or Cultivation of any plant from which	0	1	0
6B(1)(b) = raw opium/ coca leaves/	0	1	0
6B(1)(c) = poppy/ straw/ cannabis may be obtained	0	0	0
Sec. 9(a) = Possession of/ import into or export	6	0	0
9(b) = from Malaysia/ manufacture, sell	1	0	0
9(c) = or otherwise deal in any prepared opium	0	0	2
Sec. 10(1)(a) = Use of premises, Possession of utensils	0	9	0
Sec. 10(1)(b) = and consumption of	0	0	0
Sec. 10(2)(a) opium	0	0	2
Sec. 10(2)(b)	0	0	0
Sec. 12(1)(a) = Import into or export From Malaysia	0	0	0
Sec. 12(1)(b) = and dangerous drug	0	0	0
Sec. 12(2)/(3) = Possession of any Dangerous drug	397	688	595
Sec. 13(a) = Keeping or using Premises for	0	0	0
Sec. 13(b) unlawful administration of dangerous drugs	0	0	0
Sec. 13(c)	0	0	0

DANGEROUS DRUGS ACT, 1952 (REVISED 1980)	1993	1994	1995
Sec. 14(1) = Administration of any Dangerous drug to others	0	0	0
Sec. 15(a) = Self administration of Sec. 15(b) any dangerous drug	12 0	11 0	4 10
Sec. 39A = Possession of heroin or Morphine; or prepared or Raw opium	0	0	3
Sec. 39B = Trafficking in dangerous drug (dadah)	0	0	0
Other sections of dangerous drugs act, 1952	98	182	338
TOTAL	654	1043	1116

Source: Table constructed on the basis of data supplied by Prison Department, Kuala Lumpur Malaysia (1997).

TABLE 3.4 SHORT-TERM SENTENCES UNDER OTHER LAWS/ ACTS

OTHER VARIOUS LAWS/ ACTS	1993	1994	1995
Offences under Immigration Act, 1959 (revised 1975)	5408	8378	7023
Offences under Anti Corruption Act, 1961	12	12	8
Offences under Road Traffic Ordinance, 1958 (including road transport act,1987–Act 333)	244	266	186
Offences under Customs Act, 1975 (revised 1980)	76	51	45
Offences under Restricted residence enactment (cap. 39)	0	0	0
Offences under Prevention of crimes ordinance, 1959	4	3	5
Offences under Gambling Act, 1951-Act 289	151	149	92
Offences under Minor Offences Ordinance, 1955	839	834	604
Other offences not mentioned above	3178	3386	3129
TOTAL	9912	13080	11092

Source: Table constructed on the basis of data supplied by Prison Department, Kuala Lumpur Malaysia (1997).

The largest number of short-termers were involved in offences under Immigration Act in all the three years under review. They constituted approximately 54.6% in the year 1993, 64.1% in 1994 and 63.3% in 1995. The next highest number of short-termers fell under the category of other offences committed under various other legislations. They constituted 32% in 1993, 26% in 1994 and 28% in 1995. The short-termers under Minor Offences Ordinances 1955 consituted 8% in 1993, 6% in 1994 and 5% in 1995 and under Road Traffic Ordinance consisted of 2.5% in 1993, 2% in 1994 and 1.7% in 1995.

TABLE 3.5 PERCENTAGE OF SHORT-TERM SENTENCES IN MALAYSIA DURING 1993 – 1995

LAWS	1993	1994	1995
Penal Code	16%	22%	21%
Firearms (Increased Penalty) Act, 1971	17%	31%	28%
Dangerous Drugs Act, 1952 (Revised 1980)	10%	15%	15%
Other various Laws/ Acts	83%	81%	74%

Table 3.4 and Table 3.5 give comparative figures of short-term offenders showing that the largest number of prisoners consist of short-termers who were convicted for immigration offences and offences under other local legislations and Minor Offences Ordinance. Together they constituted 83% in 1993, 81% in 1994 and 74% in 1995. The percentage of short-terms for Penal Code offences, Firearms, Dangerous Drugs ranged between 10% and 31% in the years under review.

The violation of immigration laws presents a peculiar problem for Malaysia. Amongst all non Penal Code offences, violation of Immigration Act 1959 (Revised 1975) constitutes the largest number of prisoners in any single category. In fact most of the violators were sentenced to below 6 months of imprisonment.

Some strategies have to be formulated to deal with illegal immigrants who are mainly responsible for overcrowding in Malaysian prisons. Some form of alternative to short-term imprisonment has to be devised. They may be engaged in some kind of community service work or they may be involved in open camps, viz. in plantations pending their deportation. Thus, the time spent by them in the community service projects and open camps would be economically rewarding to the nation and would be most cost-effective compared to the close prison system for them[16].

3.5 COMPARATIVE SENTENCES IN MALAYSIA

(a) 1993

In the year 1993 in Malaysian prisons, 24,772 prisoners were undergoing various terms of imprisonment. Most of the offences for which they were sentenced were against public tranquillity, offences relating to public servants, voluntarily causing hurt or grievous hurt, culpable homicide not amounting to murder, criminal force and assault, various categories of thefts, robbery, receiving stolen property, criminal trespass, unlawful possession of firearms, possession of dangerous drugs,

[16] These issues have been discussed in the chapter dealing with alternatives to short-term imprisonment.

immigration offences, traffic offences, gambling and offences under Minor Offences Ordinance.

Appendix I shows that 47.1% were undergoing less than six months imprisonment, 43.2% were serving six months to below 3 years imprisonment, 7.1% 3 years to below 6 years, 1.3% 6 years to below 10 years imprisonment, 0.7% were confined for life, 0.3% were detained for natural life, 0.1% detained under Sultan's pleasure, while 0.3% were awaiting sentence of death.

(b) 1994

During the year 1994, the total number of prisoners admitted in Malaysian prisons was 30,601. Most of the offences for which offenders were admitted in prison were relating to public tranquillity, giving false evidence offences against public justice culpable homicide not amounting to murder, voluntarily causing hurt or grievous hurt, various categories of theft receiving stolen property, criminal trespass, unlawful possession of firearms, possession of dangerous drugs, immigration offences, traffic offences and offences under Minor Offences Ordinance.

It is evident from Appendix II, 51.4% prisoners were undergoing less than 6 months imprisonment, 40.4% were undergoing between 6 months to 3 years, 5.7% 3 years to below 6 years, 1.2% 6 years to below 10 years, 0.8% 10 years to below 15 years, 0.2% 15 years to 20 years or more, 0.07% imprisonment for life, 0.007% imprisonment for natural life, 0.05% detained under Sultan's pleasure while 0.2% awaiting execution.

(c) 1995

29,228 prisoners were admitted in Malaysian prisons during the year 1995. A large number of them were convicted for offences relating to public servant public health, culpable homicide not amounting to murder, voluntarily causing hurt or grievous hurt, criminal force and assault, outrage on decency, various kinds of theft, extortion robbery, receiving stolen property, criminal trespass, criminal intimidation, unlawful possession of firearms, possession of dangerous drugs, immigration offences, traffic offences and offences under Minor Offences Ordinances.

Appendix III show that 46.6% were serving less than 6 months imprisonment; 45.2% were undergoing 6 months to below 3 years imprisonment; 5.6% were confined for 3 years to below 6 years; 1.3% were admitted for 6 years to below 10 years; 0.7% were serving 10 years to 15 years and 0.1% were undergoing 15 years to 20 years imprisonment or more; 0.1% were serving imprisonment for life; 0.02% were confined for natural life; 0.02% were confined for natural life; 0.04% were detained under Sultan's pleasure while 0.2% were awaiting execution by hanging.

The prison records during 1993-1995 show that a majority of prisoners in Malaysian prisons consist of short-termers who are serving less than 6 months imprisonment. The most common offences for which they are sent to the prison are hurt, criminal force, theft, criminal trespass, possession of dangerous drugs, immigration related offences and offences of minor nature punishable under minor offences ordinance.

Those prisoners who are sent to prison for short stay are a burden on the prison administration and a liability on the taxpayer. Instead of confining them in the already over crowded prisons, the cases of such offenders may be disposed of by using non-institutional methods of treatment such as releasing them in society under police supervision, granting them probation, on engaging them in community related projects.

The courts in Malaysia are aware of the ill effects of short-term imprisonment. This is clear from the case of In re *Johari bin Ramli*[17]. In this case the accused aged 21 or 22 years, was convicted on a charge of possession of house breaking implements, an offence under S.28 (i)(ii) of the Minor Offences Ordinance 1955. The learned magistrate sentenced the accused to 10 days imprisonment. On revision the learned judge called for the probation officer's report and considering the report, he set aside the sentence and substituted an order of binding over. With regard to selection of sentence, Spenser Wilkinson J. said:

"I would like to take this opportunity of pointing out to Magistrates the great importance of a careful selection of sentence in regard to young men of this type, who having a criminal record going back to an early age can still be looked upon, although over-aged, as delinquents. There are often circumstances in which short-terms of imprisonments have to be imposed, but it should be borne in mind that a series of short-terms of imprisonment has very little effect in reforming wrong doers and often has a tendency to convert them into habitual criminals"[18].

[17] (1956) 22 MLJ 56
[18] Id. at p.57

The same view is echoed by the Indian courts as to the harmful effects of short-term sentences. In the Indian case of *Lekh Raj & Ors v. State*[19], a number of persons were convicted for the offences of preparation to commit dacoity and assembly to commit dacoity contrary to S.299 and S.402 of the Indian Penal Code respectively. They were sentenced to five years rigorous imprisonment on each count and the sentences were ordered to run concurrently. The defence argued for short-term imprisonment on the ground of the young ages of some of the offenders.

I.D.Dua J. commenting on the harmful effect of short-term imprisonment observed:

"A short stay in jail sometimes proves more harmful to the accused. The stigma of a convict without the healthy effect of disciplined influence, which a reasonably long period in a properly administered jail in a welfare state can have, is likely to result in more harm than good".

The short-term imprisonment is devoid of any useful purpose. A short stay in jail does not provide any beneficial effect to the prisoner, rather it brands him as an ex-convict without providing him an opportunity of living a disciplined life inside the prison for a long period. To discourage short-term imprisonment in India, sub section 4 of Section 354 of the Indian Code of Criminal Procedure provides:

"When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the

[19] A.I.R. (1960) Punj. 482

sentence is one of imprisonment till the rising of the court or unless the case was tried summarily under the provisions of this Code".

It is submitted that in those cases where the offence is minor and the accused is first offender, the interests of justice may be better served if the offender is kept out of the prison life by the use of the aforesaid (Sub-section 4 of Section 354 of the Code of Criminal Procedure) provision.

Many studies have been made to determine the effects of short-term imprisonment. One of such studies was made by Manheim for the Twelfth International Penal and Penitentiary Congress at the Hague in 1950. In his report he said that a prison sentence is not likely to be constructive unless it provides a period more than 6 months at least for training, education and treatment. He proposed complete elimination of all prison sentences of under 3 or even 6 months. In support of this he cited an investigation in Denmark which studied a sample of 126 prisoners who were serving prison terms of 5 months or less. In this investigation short-term imprisonment was found to be suitable in fourteen cases, while in the great bulk of the cases other measures would have been successful[20].

In England Hood found that there is nothing to show that for most of the law breakers short-term imprisonment will be more successful in preventing recidivism than fine or probation[21].

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[20] Manheim, Group problems in Crime and Punishment (1955) cited in Wolf Middendroff, *The Effectiveness of Punishment*, South Hackensack Fred B.Rothman & Co. p.86.
[21] Hood, *Sentencing in Magistrate Courts*, (1962) pp.121, 122.

In France to mitigate the harmful effects of short-term imprisonments, the prisoners are allowed to work outside of the prison during the day sometimes with and sometimes without supervison[22].

The German Criminologists are also against the imposition of short-term prison sentence. To abolish prison sentence under 6 weeks or under 3 months, if possible, is one of the requirements of the criminal policy in Germany[23].

In practice in Germany, the number of prison sentences under three months were very high. Therefore a new draft of the German Penal Code was proposed to abolish sentences of imprisonment less than one month. In some parts of Germany, there is an alternative to short-term sentence, in that a person convicted to short-term prison sentence is allowed to serve a prison sentence of some length to be served in stages on the weekends[24]. But this practice causes a considerable burden on the prison administration and staff to deal at frequent intervals with a large number of new prisoners, while prisoners face no hardship to spend a quiet night in prison[25].

Similar to the German experience, in order to reduce the prison population and in an effort to avoid sending first offenders of minor offences to prisons, the Government of Malaysia as far back as 40 years ago, set up two Compulsory

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[22] Germain, Postwar Prison Reform in France, *The Annals* (May 1954) p.144.
[23] Peters and Lang Hinrichsen, Grundfrages der Strafrechtsreform (1959) quoted in p.30 Wolf Middendroff.
[24] Peters, Grundproblem der Kriminalpada gogik (1960) p.310, 311 cited in Wolf Middendroff at p.89.
[25] Recently research conducted on the effect of imprisonment on the youthful offenders indicated that youthful offenders sent to prison had higher rate of recidivism than those given alternative sanctions such as suspension of sentences, probation and community services. This information is retrieved from internet, reference URL: http://www.uaa.alaska.edu/just/forum/f131d.html

Attendance Centres under Compulsory Attendance Ordinance 1954. This system was employed as an alternative to imprisonment for certain categories of offenders convicted for minor offences. It was believed that sending this category of offenders to prison would not only burden the prisons with custodial functions, but also disrupt the family ties and gainful employment. The short stay in prison was considered not helpful in their rehabilitation programmes and the social stigma attached to incarceration was an impediment in their readjustment in the community[26].

Under this system, the first offenders of minor offences under sentences of not more than three months imprisonment were committed to the attendance centres for not more than three hours daily after their usual working hours. They were required to report daily five days a week from 5 p.m. to 8 p.m[27].

These centres functioned for a couple of years but they soon disappeared as the courts in Kuala Lumpur and Penang where they had established seldom applied the Compulsory Attendance Ordinance 1954. The reasons for not employing this Ordinance are not known, but it may be due to the traditional outlook towards sentencing and punishment.

However, both the Compulsory Attendance Ordinance 1954 and Compulsory Attendance Rules 1955 have not repealed. It is desirable now to reduce the congestion in the overcrowded of short-termers by using the Compulsory Attendance Oerdinance 1954 to send minor offenders to these centres.

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[26] Supra note 7 at p.237.
[27] Ibid.

3.6 CONCLUSION

The statistical data of the prisoners in Malaysia and Indian prisons show that a large number of prison population consist of short-termers. Overcrowding in prisons as a result of this category of prisoners is chronic. Some of the prisons in both countries hold many more prisoners than the capacity they have to hold. The studies of the effects of imprisonment on short-term inmates indicate that these sentences are devoid of any the useful objectives of punishment. Rather it exposes them to the contaminated environment of prison life. An individual sent to prison, for a shore term far from being rehabilitated is likely to return to society to emerge more skilled in crime.

It is submitted that the first offenders and those convicted for less serious offences should not be sent to prisons. Non custodial measures may be employed for such category of offenders. The money currently used to keep such short-termers in prison can be constructively used on non-custodial measures particularly on community based programmes.

In order to reduce the prison population and avoid short-term imprisonment for first offenders and certain categories of minor offenders, the system of Compulsory attendance centres should be re-introduced in Malaysia as an alternative to imprisonment. Similarly in India, the prison population consists of a large number of short-termers, but no such provision of attendance centres exist. It is suggested, that

in India, if a law on the lines of Malaysian Compulsory Attendance Ordinance 1954, is enacted, it can reduce the population to a great extent.

A good solution for the problem in Malaysia of numerous prisoners under immigration offences who constitute a large percentage of prison population would be to place them in open camps on work in plantations. This will definitely reduce the pressure on the prison population and effectively cut down the expenses of providing them facilities until pending their deportation.

In our countries, resources are scarce, and it is inexpedient to take large number of able bodied young men out of society and make them unproductive and deprive them to support their families and place the burden of their maintenance on charitable organisations and the State.

CHAPTER FOUR

NON CUSTODIAL MEASURES AS AN ALTERNATIVE TO SHORT TERM IMPRISONMENT

4.1 INTRODUCTION

Crime as a social phenomenon has existed throughout the history of mankind. However, it has been increasingly realised that it is possible to reduce the crime rate and the deleterious effects on the society in particular on the victims, if a constructive and meaningful policy is adopted. There is a growing awareness that one such constructive approach is the change from custodial measures of punishment to non-custodial measures. This policy is in line with the crime control programmes. In all societies efforts are being made to control crime as well as to relieve offenders, their families and society as a whole from the ill effects of crimes by adopting community oriented programmes of punishment.

But the fact remains that a large number of offenders are still dealt with by custodial measures of punishment. A majority of them are short termers who are serving sentences for the commission of petty offences who could otherwise be dealt with by non-custodial measures. In the previous chapter, we have observed that short termers are unnecessary burden on the state. They gain nothing during their period of incarceration. Rather they return to the society contaminated with all types of vices and indulge in criminality with fury and finesse. As we have observed earlier, many studies on the effects of imprisonment on short termers have indicated that short-term imprisonment does not have any rehabilitative effect. This chapter examines closely

the aims, the effectiveness and the use of various non-custodial measures as an alternative to short term imprisonment for the education, reintegration, and resettlement of the offenders. The non-custodial measures, discussed in this chapter include, (a) absolute or conditional discharge and binding over, (b) probation, (c) fine (d) community services and (e) attendance centres.

4.2 ABSOLUTE OR CONDITIONAL DISCHARGE AND BINDING OVER

This part of the chapter is devoted to the consideration of absolute or conditional discharge and binding over as a measure to avoid short term imprisonment.

An absolute discharge is employed by the court where it regards the process of arrest, charge and hearing in itself as sufficient punishment. The Court requires nothing from the offender and imposes no restriction on future conduct. However, the order follows a finding of guilt but the court does not proceed to record a conviction. This discharge differs from an order of conditional discharge in which, the courts allow the offender to return to the community without subjecting them to any supervision. The usual way in which sentencing options are exercised require the offender to enter into a recognisance which imposes certain conditions. Discharge is conditional upon entering into recognisance. Failure to comply with conditions laid down can lead to further action.

Where the court finds the offender guilty but does not record a conviction, it may either discharge the offender absolutely or impose conditions for a specified

period. Sections 173 A[1] 293[2], and 294[3] of the Malaysian Criminal Procedure Code and Sections 360[4] and 361[5] of the Indian Criminal Procedure Code confer powers on the courts to release the offenders on absolute or conditional discharge and binding over. Sections 3 and 4 of the Probation of Offenders Act, 1958 (Indian) also contain similar provisions for absolute discharge with admonition and conditional release with binding over.

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[1] Section 173 A of the Malaysian Criminal Procedure Code (hereinafter C.P.C) provides that "when any person is charged with any offence punishable by such court and that the court finds that the charge is proved but is of the opinion that having regard to the character, antecedents, age, health or mental condition of the person or trivial nature of the offence, or to the extenuating circumstances under which it is committed, it is inexpedient to inflict any punishment or any other or nominal punishment or that it is expedient to release the offender on probation, the court without recording a conviction, dismissed the charge or complained after such admonition or caution to the offender as the court seems fit."

[2] Section 293(1) of the Malaysian Criminal Procedure Code deals with youthful offenders and provides that when any youthful offender is convicted before any Criminal Court of any offence punishable by fine or imprisonment, such Court may instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment: (a) order such offender to be discharged after due admonition if the Court shall think fit; or (b) order such offender to be delivered to his parent or to his guardian or nearest adult relative or to such other parent, guardian, relative or other person executing a bond with or without a surety or sureties, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of such offender ordering him to be of good behaviour for any period not exceeding two years.

[3] Section 294(1) of the Malaysian Criminal Procedure Code provides that "when any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to such Court that regard being had to the character antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgement if and when called upon and in the meantime to keep the peace and be of good behaviour."

[4] Section 360(1) of the Indian Criminal Procedure Code (1973) (hereinafter Cr.P.C) reads as follows:
"When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour."

[5] Section 361 of the Indian Criminal Procedure Code (1973) reads as follows:
"Where in any case the Court could have dealt with: (a) an accused person under s. 360 or under the provisions of the Probation of Offenders Act, 1958 or (b) a youthful offender under the children Act 1960 or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgement the special reasons for not having done so."

It follows from the wordings of Section 173 A of the C.P.C that the following conditions must be fulfilled before the court can grant absolute discharge.

1) It applies to all offenders.
2) The Court does not record the conviction.
3) The Court gives consideration to age, character, antecedents, health, and mental condition of the offender, the triviality of the offence and extenuating circumstances of the commission of the offence.
4) It is inappropriate to inflict any punishment other than nominal punishment.
5) The period of bond does not exceed more than three years.
6) The charge or complaint is dismissed after admonition or caution to the offender.

The essential requirements for the application of Section 294 of the C.P.C are as follows:

1) It applies to adult offenders only.
2) The conviction is recorded.
3) The Court gives consideration to age, character, antecedents, health, and mental condition of the offender, triviality of the offence, and extenuating circumstances of the offence.
4) It is used where the offence is punishable with imprisonment.
5) It is expedient to release the offender on probation of good conduct.

The cases in which absolute discharge are granted are such in which the law has somehow failed because the accused is morally blameless and no deterrent purpose would be served by his punishment and also the cases in which the court believes that

the accused's conduct was an isolated instance and no further pressures are required to keep him up to the scratch[6].

The condition which forms part of the discharge is that the offender should commit no further offence during the specified period which may be up to three years.

If a further offence is committed during the specified period the court may sentence the offender not only for that offence but also for original offence which gave rise to conditional discharge. The essence of the conditional discharge is therefore a threat or warning. The court is prepared to impose no sanction for the present offence on condition there is no new offence within the specified period[7].

In a Malaysian case of *Public Prosecutor v. Onn*[8], the accused was tried by a Magistrate under Section 380 of the Penal Code for stealing in a dwelling house two and a quarter yards of cloth. At the close of the trial, the trial Magistrate found the charge proved and proceeded to exercise his powers under Section 173 (2) of the C.P.C and discharged the offender conditionally on his entering into a bond for good behaviour and imposed the conditions of the bond under Section 294 A of the C.P.C[9].

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[6] Rupert Cross, *The English sentencing System*, London, Butterworth, (1971).
[7] Andrew Ashworth, *Sentencing and Criminal Justice*, London, Butterworth (1995) p. 255.
[8] (1969) 1M.L.J 4
[9] Section 294 A of the Malaysian Criminal Procedure Code reads as under:
"When any person is required by any Court to execute a bond with or without sureties and in such bond the person executing it binds himself to keep the peace or binds himself to be of good behaviour the Court may require that there be included in such bond one or more of the following conditions namely:
(a) a condition that such person shall remain under the supervision of some other person named in the bond during such period as maybe therein specified;
(b) such conditions for securing such supervision as the Court may think it desirable to impose;
(c) such conditions with respect to residence employment associations abstention from intoxicating liquors or with respect to any other matter whatsoever as the Court may think it desirable to impose."

In revision of the petition, the deputy public prosecutor drew the attention of the learned judge that the conditions of the bond under Section 294 A requiring the offender to be placed under supervision of a probation officer for a defined period and prohibiting him from associating with other persons were illegally imposed.

The learned judge agreed with the deputy public prosecutor and held that a condition requiring the offender to be of good behaviour in paragraph (b) of Section 173 A has no punitive effect in as much as it merely enjoins the offender to behave like any other law abiding citizen. But, the same cannot be said of the nature of the two conditions set out in Section 294 A of the C.P.C. Section 294 A contains conditions which are punitive in effect and which, if imposed, would amount to some form of punishment being inflicted on the offender. Accordingly, to inflict any of these conditions on an offender, who has not been convicted of an offence would be repugnant to the accepted notion of the justice.

In this case, the learned judge gave a clear guideline to the courts that when exercising power under Section 173 A of the C.P.C, the court should not proceed to conviction. To impose any condition on the release of the offender would be against the accepted principles of natural justice.

Public Prosecutor v. Idris[10] further sheds some light on the application of Sections 173 A and 294 of the C.P.C. In this case, the accused was charged before the Magistrate with negligent driving in contravention of the Motor Vehicles Proclamation. He pleaded guilty. The learned Magistrate took the view that the

[10] (1955) 21 M.L.J 234.

offence was not a serious one and bound the accused over for six months under Section 294 of the C.P.C. Against this order the public prosecutor appealed.

On appeal the learned judge of the High Court set aside the order of binding over and held that Section 294 of the C.P.C only applies in the case of an offence punishable with imprisonment and as the offence in this case was punishable with a fine only[11] the order of binding over under Section 294 was wrongly made and must be set aside.

As to the application of Section 173 A and Section 294, the learned judge observed that there is a certain amount of overlapping between the two sections in the sense that very often a case may be appropriately dealt with under either of them. There are, however certain differences, which must be carefully observed. Section 173 A is applicable in all cases, triable in the Magistrate Courts irrespective of the nature of the prescribed punishment and it is to be observed that where it is proposed to exercise the powers given by it the Court should not proceed to conviction. Section 294 on the other hand, which only applies in a case of adult offenders, can only be made used of, where a person has been convicted and where his conviction is for an offence punishable with imprisonment without the option of a fine.

In *Public Prosecutor v. Lim Hong Chin*[12], the accused pleaded guilty to the charge of voluntarily assisting in the disposal of certain articles knowing them to be stolen property, an offence under Section 414 of the Penal Code. After hearing the plea of mitigation by counsel for defence, the learned trial Magistrate made an order under

[11] Under Indian Statutes different terminology is used. Hence probation is a possibility even in offences punishable with fine only.
[12] [1993] 3 M.L.J 376

Section 294 (1) of the Criminal Procedure Code binding over the accused with two sureties in the sum of RM5000 to be of good behaviour for a period of three years.

On appeal the learned public prosecutor contended that even if the said Section 294(1) was capable, in law, of being applied, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

The learned judge of the High Court dismissed the appeal and agreed with the learned trial Magistrate, who gave various factors for resorting to Section 294 (1) of the C.P.C. These included the remorse shown by the accused, his clean record, the plea of guilty, co-operation with the police, public interest and unsuitability of custodial sentence on the facts and circumstances of the case. The learned trial Magistrate seems to be of opinion that, given the opportunity, the accused was unlikely to commit offences of similar nature again. In any event, should the accused fail to observe the conditions of the bond during the period of three years, he may be directed to appear in court to receive judgement.

Section 360 of the Indian Criminal Procedure Code also empowers the court to grant absolute or conditional discharge to the offender. This section provides when any person above 21 years of age is convicted of an offence, punishable with fine only or with imprisonment for a term of 7 years or less, or when any person under 21 years of age or any woman is convicted of an offence not punishable with death or imprisonment for life and no previous conviction is proved against the offender, the court may instead of sentencing at once to any punishment direct that he may be released on his entering a bond with or without surety to appear and receive sentence

when called upon during such period as the court may direct and in the mean time to keep the peace and be of good behaviour.

This section gives discretion to the court to treat the criminals leniently for the purpose of reforming them, in those cases where no serious social danger or threat to the society is involved. The courts have to use their discretion judicially having regard to the age, character, and antecedents of the offender[13]. This section is intended to be used to prevent young persons to be sent to prisons, where they may mix up with hardened criminals who may lead them further in to the life of crime and also help those mature persons who might have committed crimes through ignorance or bad influence of others who but for such lapses would be good citizens.

Though Section 360 of the Cr. P.C. gives a discretion to the court to release the offender on his entering into the bond in the circumstances mentioned therein, Section 361 of the Cr.P.C. requires the court to record special reasons for not proceeding under Section 360 when the conditions mentioned therein are found. The special reasons contemplated by Section 361 must be of such a nature as to compel the court to hold that it is impossible to reform or rehabilitate the offender and such a finding has to be arrived after examining the matter with due regard to the age, character and antecedents of the offender and circumstances in which the offence was committed[14].

In *Saradhakar Sahu v. State of Orissa*[15], the petitioner was convicted under Section 324 of the Indian Penal Code and sentenced to rigorous imprisonment for three months. On revision to the High Court, the counsel for the petitioner drew the

[13] Emperor vs. Dukalha (1933) 34 Cr. L. J 272.
[14] Dilbag Singh vs. State of Punjab, 1979, S.C.C. (Cr.) 376.
[15] (1985) Cri.L.J. 1591.

attention of the High Court to the provisions in the Probation of Offenders Act and Section 361 of the Cr. P. C and urged that sentence was vitiated for non-compliance with the provisions contained in Section 361 of the Cr.P.C. It was further submitted by the learned counsel that where there has been much advancement in the field of criminology and the attitude of the society in the prescription of law vis a vis the offender, the court should not lag behind and administration of justice under the criminal jurisdiction in a mechanical and heartless fashion.

It was held by the learned judge of the High Court that sentencing the guilty is the last and the most important, albeit a difficult chapter in a trial. It involves sensitive exercise of discretion and not a mechanical prescription acting on hunch. Theories of punishment are many; reformative, preventive, deterrent, retributive and denunciatory. Retributive and denunciatory theories have lost their potency in the civilised nations. Deterrent and preventive punishment is sometimes necessary in the interest of society, regard being had to the nature of the offence, well being, security and preservation of society. The modern trend places emphasis on the reformation of the offender and his rehabilitation. No one is a born criminal. The circumstances beyond his control and social environments sometime change yesterday's innocent into today's offender. Often a crime is committed on the spur of the moment, without premeditation, or by a scheme or planning of a thoughtless act or due to uncontrollable influence. Given a chance many a person would reform and lead a new chapter, granted congenial conditions and rehabilitation. Most offenders are first offenders, many are youthful offenders. Association with an influence of hardened criminals in jails might make redemption impossible. A spell in prisonmight destroy the personality irretrievably.

The learned judge allowed the revision and held that incident was the outcome of acting on the spur of the moment or an act of mere thoughtlessness or uncontrollable influence. It was certain that the petitioner was a first offender as no previous conviction had been proved against him. Having regard to the circumstances of the incident, and in the absence of any adverse material as regards his character and antecedents, had the Magistrate applied his judicial mind, the petitioner should have been dealt with under Section 360 of the Indian Cr.P.C. .

In *Sivasamy v. Sub Inspector Coimbatore*[16], the petitioner accused was charged before the Magistrate court for offences under Sections 457 and 380 of the Indian Penal Code for committing theft of 15 Kg of rice valued at about Rs. 75. The learned Magistrate found him guilty and convicted him for the aforesaid offence and sentenced him to rigorous imprisonment for three months for each offence. The petitioner appealed against the order of the Magistrate.

It was submitted on behalf of the petitioner that on the salutary effect of the provisions as adumbrated under Sections 360 and 361 of the Cr. P. C. coupled with Section 6 of the Probation of Offenders Act 1958, it is mandatory on the part of the Magistrate to consider the question of accused being released on probation of good conduct instead of straight away sentencing him to imprisonment. A perusal of the order of the Magistrate would reveal complete absence of application of mind on this aspect of the order.

[16] (1992) Cr. L. J. 2041.

It was found by the court that the petitioner accused was 19 years old at the time of conviction and had not any sort of blemished career, in the sense of himself having been convicted for such offence previously. That apart, he was a poverty stricken man. In the back drop of the setting of the situation of the placement of the petitioner, the learned judge considering the application of the provisions of Section 360 and 361 of the Cr. P. C. and Section 6 of the Probation of Offenders Act held that it is clear from these provisions that it is mandatory on the part of the learned Magistrate to record his reasons in the judgement for not releasing the offender on probation of good conduct under the benevolent provisions of the Act. The learned Magistrate had not stated anything in his judgement on these aspects on the matter. Taking into account the age, antecedents and character of the petitioner accused and circumstances, under which he resorted to commit the petty theft of 15 Kg of rice he was eminently suited to be released on probation of good conduct.

The approach adopted by the court in this case appears to be in consonance with the modern methods of treatment of the offenders. The use of the benevolent provisions of the Cr. P. C. and the Probation of Offenders Act can save a lot of petty offenders from the effects of short term imprisonment and save not only the offenders in particular, but, the society in general. This may save overcrowding of prisons as well as protect the society from the contaminated effects which the persons sent to prisons may bring back in to the society.

In *Keraj Singh v. State of Punjab*[17], the petitioner was convicted for offences under Sections 324/325 of the Indian Penal Code and sentenced to undergo rigorous

[17] (1996) Cr. L. J. 4414.

imprisonment for two years and to pay a fine of Rs. 300 in default of payment of fine to undergo further rigorous imprisonment for 3 months for the offence under Section 325 of the Indian Penal Code and to undergo rigorous imprisonment for 1 year for the offence under Section 324 of the Indian Penal Code. Both the sentences were ordered to run concurrently.

The counsel for the petitioner argued that while passing the sentence, the trial Magistrate did not comply with the mandatory provisions of Sections 360 and 361 of the Cr. P. C. It was further submitted by the counsel that the petitioner had no previous conviction and that his co-accused (father) has already been released on probation and there was nothing to discriminate against the petitioner and on the facts and circumstances, the petitioner should be released on probation of good conduct.

The learned judge of the High Court allowed the petition and held that whenever the facts and circumstances of the case call for extension of the benefit conferred by Section 360 of the court, it is duty of the court to extend the said benefit. In case, this benefit is denied, it is the duty of the courts to consider why compliance with beneficial provisions could be dispensed with even if the accused did not make any such request[18].

In the present case the learned judge found that both the lower courts have failed to record the reasons for not extending the benefits of Section 360 of the court to the petitioner. The only reason given by the trial court is that the offence under section 325 of the I. P. C. is punishable with imprisonment of 7 years and keeping in view of the serious nature of the offence, the petitioner could not be released on probation of

[18] Id. 4416.

good conduct. This approach is totally contrary to the scheme and object of Sections 360 and 361 of the Code[19].

In this case, it was not in dispute that the petitioner had no previous record and has no past criminal history and it is also not the case of the prosecution that it is not possible to reform and rehabilitate the petitioner. This case is fully covered by the beneficial provisions of Sections 360 and 361 and the benefit of the said provisions must be extended to him.

The cases decided by the courts in Malaysia and India show that the courts are always willing to apply the provisions of absolute and conditional discharge on binding over the accused. These provisions if applied suitably can go in a long way to reduce the recidivism and protect the society from the ill effects of short term sentences.

4.3 PROBATION

Criminal justice plays an important role in correction and rehabilitation of offenders. Probation system is the agency through which criminal justice can render invaluable contribution to the treatment, correction and rehabilitation of the offenders. Probation as a non custodial measure has proved successful especially with first offenders and as a cost effective mechanism for screening out of offenders who do not require imprisonment. It is one of the outstanding measures which is designed to work for early reformation and re-socialisation of criminals while they remain in the community as other citizens by subjecting them to certain conditions which they must comply with and by providing them with guidance, supervision and aid.

[19] Ibid.

In Malaysia there is no separate statute which exists for the grant of probation for adult offenders. The system of supervision which is sine qua non for an effective rehabilitation of offenders does not exist for adult offenders. However, juveniles can be released on probation under the Juvenile Courts Act 1947[20]. In India, comprehensive legislation exists for the grant of probation to juveniles as well as adult offenders. Sections 360 and 361 of the Indian Criminal Procedure Code 1973 empowers the Court to release offenders on probation. The Probation of Offenders Act 1958[21] (Indian), a central Act allows the release on probation of all categories of offenders. The Act supersedes Sections 360 and 361 Cr.P.C. in places where it has been enforced. The Act of 1958 provides for probation services namely preparation of pre-sentence report, supervision and counselling of the probationers.

This part of the chapter proposes to discuss the concept, the need and the use of probation, in Malaysia and India. An attempt has also been made to look into the full implementation of Probation System in Malaysia in the light of Indian experience and also to examine its viability in reduction of short term sentences.

4.4 THE CONCEPT AND NEED OF PROBATION

Probation is an extra-mural form of treatment i.e. treatment outside the four walls of the prisons. It challenges the validity of sending a large number of offenders to prisons cells. It is therefore essential to understand clearly the concept of probation and to remove some of the erroneous notions about it.

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[20] See Section 2 of Juvenile Court Act, 1947.

[21] See generally The Indian Probation of Offenders Act 1958.

The word probation is derived from "probare" a Latin word meaning "a period of proving on trial". It has been well defined in the United Nations publication "Probation and Related Measures" as follows:

> "Probation is a method dealing with specially selected offenders, and consists of conditional suspension of punishment, while the offender is placed under personal supervision and is given individual guidance on treatment. Probation is a humane, effective, flexible and economic way of dealing with offenders. It provides an alternative method to the courts of dealing with the offenders who might be sent to any penal institution."[22]

Probation to be correctly understood has three special features:

1) Compared with other forms of punishment, it is a treatment programme meant for the offender's rehabilitation in society rather than confinement behind the stony walls of prisons.
2) It takes into consideration the personality traits of the offender, and the gravity and nature of the offence for grant of probation.
3) It provides offenders an opportunity to prove themselves, gives them a second chance, and makes provision for personal guidance and close supervision by trained personnel who can help them to re-establish proper forms of behaviour in the community[23].

Probation is the outcome of a realisation that a majority of offenders need sincere interest and advice from other human beings in their lives for betterment and strengthening of their moral fibre. It provides the probationer social, psychological and economic assistance for his re-adjustment in the society.

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[22] Cited in J.H.Shah, *Probation – A Method of Treatment* Crime Correction and Probation, Agra Institute of Social Sciences (1975) p. 174.
[23] *Introduction to Criminal Justice* by Serna and Siegal, New York West Publishing Company (1981) p.446.

Probation has a special feature in the sense that it is directly built upon positive co-operation and acceptance of the offender. It utilises all the social control measures to prevent crime and those, which are available in an open community such as the care and maintenance of the family for which the probationer is responsible and necessity of keeping a job to discharge his responsibility.

In terms of cost-accounting, a comparative analysis of the expenditure involved in institutional treatment of an offender and expenses in maintaining probation supervisions may convince the state exchequer that probation is more economical with promise of great success in reformation and rehabilitation of offenders[24]. A great advantage of probation system is it saves the youthful offenders and first offenders from the stigma of a prison term and contamination from the criminal subculture of prisons.

The persons who are placed on probation are those who are not hard core criminals or a risk to society but those who have committed offences under some momentary weakness of character or some uncontrollable impulse or tempting situation.

Probation sometimes is mistakenly said to be a "letting off" of the accused. It is true, of course, its great merit lies in that it gives another chance to the offender. But, those who maintain that probation is a let off, fail to understand that every person

[24] In United Kingdom, a prison is said to cost the exchequer on an average of £138 a week. The cost of building a modern security prison is £900,000. In America imprisonment costs more than 10 times expenditure on probation. See B.K.Bhattacharya, *Violence, Delinquency, Rehabilitation*, Bombay N.M.Tripathi (1977) p. 71.

released on probation is subject to certain limitations and obligations i.e. the probationer is under the supervision of a probation officer for a certain period fixed by the Court to make it clear to the offender the effect of the order and any special requirement that if he fails to abide by its terms or commits another offence, he will be liable to be sentenced for the original offence.

4.5 PROBATION IN MALAYSIA

4.5.1 The Cost

Probation is very useful for Malaysia, particularly in the context of shortage of manpower. A great majority of the prisoners in Malaysian prisons[25] constitute those who are undergoing jail sentences for committing trivial offences and serving short term sentences. As we have observed earlier[26] short term sentences are unproductive and the prisons doing nothing worthwhile but adding congestion to the already over crowded prisons[27], a burden on the tax payer. The Malaysian Prison Department spent RM15 million in the year 1993 only on feeding the prisoners[28]. The other expenses involved in the establishment of prisons and the cost of maintaining them is much higher.

As against the higher expenditure in maintaining petty offenders in prisons, the cost of probation services would be minimal. Of course, whether the person be granted probation or confined in prison should not be decided exclusively on the basis of the expenses the State may incur, yet the fact remains that the prisons in Malaysia

[25] There are about 22000 prisoners in the Malaysian prison. See infra note 28.
[26] See generally chapter 3.
[27] Hj. Shardin bin Chik Lah, "Practical measures to alleviate the problem of overcrowding", *Resource Material No. 36* UNAFEI (1982) p.314.
[28] See Malaysian Law News, January 1994, an interview with Prison Director General.

are overcrowded and the State has to spend a lot of money in construction of new prisons and maintaining them, when the money is needed in major projects for social upliftment. Since overcrowding in prisons makes it difficult to keep separate innocent under-trials from the hardened criminals, a prison sentence becomes counter productive for petty offenders. Their association with the most experienced people of the underworld makes them worse when they come back to society. The answer to these problems may be found in probation. It is cost effective; it provides a fairly good chance for the petty offenders of being rehabilitated in the society. Moreover it does not require the establishment of large institutions because a probation officer merely needs moderate facilities by way of transportation to supervise a large number of probationers.

4.5.2 The Law

In Malaysia the system of probation is provided for in the Juvenile Courts Act and Criminal Procedure Code. The law makes a difference between youthful offender and the first offender in respect of probation. The sentencing court is conferred with the power to grant probation to the youthful offender under the Juvenile Act and under Sections 293[29] and 294 of the Criminal Procedure Code. The Court is empowered to release any person convicted of an offence punishable with imprisonment on probation of good conduct with such conditions as the Court may deem fit including a condition that such person will remain under the supervision of some other person named therein. There are some notable differences in the provisions in the Juvenile Courts Act and the Criminal Procedure Code. Youthful

[29] Section 293 of the C.P.C gives three options to the sentencing Court namely (a) Discharge after due admonition (b) Deliver the youthful offender to parent under a bond to ensure good behaviour of the offender (c) whipping with light cane of male youth offender.

offenders under the C.P.C include an offender above the age of 10 years and under the age of 16 years, whereas, a juvenile offender under the Juvenile Court Act is a person aged between 10 and 18 years. Youthful offender under Juvenile Court Act is a person between 18 and below 21.

The Juvenile Courts Act allows the Juvenile Court to pass a probation order in the case of a juvenile[30], who is found guilty of an offence other than the offence of homicide. Before passing such an order, the Court shall take into consideration the nature of the offence and the character of the offender. When making such an order, the Court shall explain to the offender in simple language the effect of the order and that in case he fails to comply with the conditions imposed on his probation or commits another offence, he shall be dealt with for the original offence as well as for the other offences[31].

The probation order shall include certain requirements as to residence, whether the probationer shall be required to stay in a probation hostel[32] or probation school[33] or some other place, or some other conditions as the Court may consider necessary for securing good conduct and for preventing the repetition of the same offence or the commission of other offences[34].

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[30] Section 2(1) of the Juvenile Courts Act 1947 defines juvenile as a person who has attained the age of criminal responsibility prescribed under Section 82 of the Penal Code is under the age of 18.
[31] Section 21(1) of the Juvenile Courts Act.
[32] In Malaysia, 11 such probation hostels have been established. The period of stay in such hostels of the probationer shall in no case extend more than 12 months.
[33] Six probation schools are working under the Department of Social Welfare, where maximum period of stay of the probationer is three years.
[34] Section 21(2) of the Juvenile Courts Act.

The probationer shall remain under the supervision of a probation officer[35] appointed under the probation order for a maximum of three years and a minimum of one year from the date of issue of the probation order or any other date specified in it[36].

In the cases of youthful offenders[37], the Criminal Procedure Code also allows the release of offenders on probation. When a youthful offender is convicted by a Court of any offence punishable by fine or imprisonment, such Court may instead of passing any sentence on the offender, either discharge him after due admonition, or deliver him to his parent or guardian on executing a bond with or without sureties, or the Court may deal with him in the manner prescribed by the Juvenile Courts Act[38].

The provisions which deal with juvenile and youthful offenders as laid down under the Juvenile Courts Act and the Criminal Procedure Code appear to be adequate to make use of probation or to release such offenders on executing a bond as an alternative to the conventional form of punishment. The Courts have invoked them in some cases.

4.5.3 The Judicial Approach

In *Re Johari bin Ramli*[39], the accused aged 21 or 22 years, was convicted on a charge of possession of house-breaking implements, an offence under s. 28(i)(ii) of the Minor Offences Ordinance 1955. He had a number of previous convictions but

[35] More than 300 probation officers are working under the Ministry of Social Welfare.
[36] *Supra* note 34.
[37] *Section 2 of the Criminal Procedure Code defines a youthful offender as one aged between 10 to* below 16. Section 40 of the Juvenile Courts Act puts such an offender between 18 to below 21 years.
[38] Section 293 of the Criminal Procedure Code.
[39] [1956] 22 M.L.J 56.

details of these were not recorded by the Magistrate who only noted that "The accused admits several (six) previous convictions for theft, house-breaking and possession of stolen property". The learned Magistrate sentenced the accused to 10 days imprisonment.

On revision, the learned Judge called for a probation officer's report and after considering the report, he set aside the sentence and substituted an order of binding over the accused in the sum of RM500 to be of good behaviour and to come up for sentence when called upon and in the meantime to be under the supervision of a probation officer. With regard to the selection of sentence Spencer-Wilkinson J said:

> "I would like to take this opportunity of pointing out to Magistrates the great importance of a careful selection of sentence in regard to young men of this type who having a criminal record going back to an early stage can still be looked upon, although over-aged, as juvenile delinquents. There are often circumstances in which short terms of imprisonment have to be imposed, but it should be borne in mind that *a series of short terms of imprisonment has very little effect in reforming wrong-doers and often has a tendency to convert them into habitual criminals*[40].

The Courts have always shown concern towards young offenders, and have insisted that such young offenders be kept out of prison. In *Tukiran bin Taib v. Public Prosecutor*[41], the accused was charged in the Magistrate's Court with the theft of 167 coconuts under s. 379 of the Penal Code. He pleaded guilty to the charge and was given four months' imprisonment. As the accused was 17 or 18 years, the learned Judge of the High Court called for the record of the proceedings to satisfy himself as to the propriety of the prison sentence imposed by the Magistrate. Setting aside the

[40] *Id.* at p.57.
[41] [1955] 21 M.L.J 24.

sentence of imprisonment and making an order of committal to Henry Gurney School[42], Bellamy J said:

> Before passing sentence the Magistrate should first make careful inquiries regarding the background, antecedents and character of the convicted person, and this is particularly of importance when the convicted person is a young offender and it is contemplated imposing a sentence of imprisonment. A probation officer's report should always be called for, and, a Magistrate should not hesitate to adjourn the case in order to obtain such a report before passing sentence. Inexperienced Magistrates sometimes are in doubt as to the proper manner of bringing in such a report. The probation officer should be called as a witness and give the substance of this report.

In *Public Prosecutor v Teh Ah Cheng*[43], the respondent was charged for being in possession of a revolver and six rounds of ammunition, an offence under Section 9(a) of the Arms Act 1960. He pleaded guilty to the charge. The Special President of the Sessions Court applied Section 294 of the C.P.C and instead of imposing any term of imprisonment, ordered the responded to be bound over for a period of two years. The Public Prosecutor appealed.

Allowing the appeal, Abdoolcader J said:

1. In sentencing generally the public interest must necessarily be one of the prime consideration, and more particularly in offence involving the unlawful use or possession of firearms, the public interest should never be relegated to the back ground and must of necessity assume foremost importance;

[42] Henry Gurney School is located in Melacca and is meant for reform and rehabilitation of juvenile offenders. It is similar to certified/approved scholars in India.
[43] [1976] 2 M.L.J 186.

2. Of the several concepts relevant to sentencing, deterrence and prevention assume position in the forefront in relation to offences of this nature;
3. If a person is not too young to have in his possession and to handle firearms and does so unlawfully then he is certainly not too young to suffer the penalties therefore prescribed by law;
4. The order made by the Special President should be set aside and the respondent sentenced to three years' imprisonment

This case shows that the court is not inclined to apply the provisions dealing with binding over in the case involving firearms. In such a case, the emphasis is on the deterrent objective of punishment. It is true that one of the aims of punishment is deterrence. To achieve this aim, public interest should not be ignored. It is also in the public interest that he should be a good citizen. It is submitted that in those cases where the probation report suggest that it is safe to bind over the offender or to release him on probation of good conduct, the court should give another chance to the offender to turn over a new leaf, instead of sending him at once to prison. This would also protect the offender from the undesirable effect of prison life to which he may be subjected during his short stay in prison.

The above approach was adopted by the court in *Teo Siew Peng & Ors v. Public Prosecutor*[44]. In this case, five appellants, who were young and first offenders, were charged with the offence of gang robbery contrary to Section 395 of the Penal Code in the Sessions Court. They pleaded guilty to the charge. The Sessions Court called for probation reports, and sentenced the first, second, fourth and fifth appellants to one

[44] [1976] 2 M.L.J 186.

year's imprisonment and two to three strokes of rotan, and the third appellant to one years detention in the Sarawak's Boy's Home and two strokes of the rotan. The appellants appealed against sentence.

On appeal, it was submitted on behalf of the appellants, that the lower court had given insufficient consideration to the probation reports on the appellants, and having regard to the facts, the antecedents and character of each of the appellants the sentence was excessive.

Allowing the appeal Tan Chiaw Ting J said:

> An appellate court does not alter the sentence of a lower court unless it has erred in principle or the sentence is manifestly excessive. In particular circumstances, for the reasons that the reformative factors involved in sentencing and the probation reports and character and antecedents of the appellant do not appear to have been adequately considered the lower court had erred in principle and therefore the appellate court should interfere in the sentence. There is no conflict between public interest and that of young offenders, and the public have no greater interest than that they should become good citizens[45].

Again in the case of *Public Prosecutor v. Tan King Hua*[46], the accused aged 16 years, was convicted by the Magistrate to one year's imprisonment for theft. On revision of the case, the learned Judge set aside the sentence of imprisonment and held that it was wrong for the learned Magistrate to impose a sentence of imprisonment in this case in view of the age of the accused. In those cases where

[45] Ibid
[46] [1966] 1 M.L.J 24.

youthful offenders are involved it is advisable to take advantage of the probation service.

Highlighting the importance of non-institutional treatment of offenders, Lee Hun Hoe J observed:

> Youthful offenders should be treated with sympathy and understanding. In most cases they get into trouble because of poor family upbringing and lack of proper control.

Advantage should be taken of those provisions in the Criminal Procedure Code which deal with youthful offenders. The main consideration in dealing with a youthful offender must always be to help him to become a good and useful citizen. To allow him to mix with hardened criminals in his early life would cause him harm on his later life. Everything reasonable should be done to avoid sending such an offender to prison if another suitable punishment is available[47].

In *Teoh Ah Kow v. Public Prosecutor*[48], the appellant aged 16 years, was convicted of abetting the commission of the offence of voluntarily causing hurt by means of a knife. Upon conviction he was sent to the Henry Gurney School for three years. On appeal it was submitted on behalf of the appellant that there was insufficient evidence for a conviction and the learned president should have compiled with s. 172 of the C.P.C by giving the appellant an opportunity to recall and re-examine witnesses called by the prosecution on the amended charge.

Dismissing the appeal, the Court held that there was sufficient evidence to justify the conviction but in view of the probation officer's report which did not

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[47] Ibid

[48] [1961] 27 M.L.J 75; also see the Court's insistence on probation officer's report on the background of the person to be sentenced in the *Yew Whatt v. Public Prosecutor* [1958] 24 M.L.J 171.

disclose any connection of the appellant with secret societies, the Court set aside the order of committal to Henry Gurney School and discharged him, under s. 21 of the Juvenile Courts Ordinance 1947, conditionally upon entering into a bond with his father as surety for two years. The Court further made a special condition of the bond that during the period of bond the offender shall remain under the care, supervision of the probation officer.

The probation officer's report may be of assistance to the Courts while imposing sentence on juveniles and youthful offenders, but to rely solely on such reports without giving the opportunity to the offender to say something in his defence would be against the established principles of natural justice.

In *Public Prosecutor v, Hoay Lean Hock*[49], the respondent aged 16, was charged with seven others with the offence of curfew-breaking. All of them pleaded guilty to the charge. The trial Magistrate convicted all the seven accused except the respondent to three months' imprisonment. But as the respondent was a youthful offender, the learned Magistrate sent for a probation report on him, and after reading the report, made an order under s. 39 of the Juvenile Courts Ordinance for his committal to the Henry Gurney School for a period of three years.

On revision of the case, the learned Judge found that the Magistrate decided the case on the basis of the probation report which included, *inter alia*, the fact that the offender was a member of a secret society. This report was not read out to him. The learned Judge declared that a report of this nature instead of trying to assist a juvenile becomes damaging to him. In the circumstances of the case the order for

[49] [1968] 2 M.L.J 173.

detention in the Henry Gurney School was set aside and respondent was allowed to be released on bond.

A perusal of the cases discussed above shows that the Courts in Malaysia have realised the importance of the probation system and have always stressed on the need to take advantage of probation service in the cases of juvenile and youthful offenders. There is no denying the fact that most of those who were provided probation services completed their probation period successfully. This fact is borne out by the statistics provided by the Ministry of Social Welfare.

DEPARTMENT OF SOCIAL WELFARE, MALAYSIA

REHABILITATION SERVICES

TABLE 4.1: JUVENILES FOUND GUILTY UNDER STATUTORY LAWS[⊗]

TYPES OF OFFENCE	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
a) Offence Against Property	2753	78	2705	63	2812	64	8270	205
b) Offence Against Person	279	4	266	1	315	2	860	7
c) Sexual Offence	37	2	33	0	32	1	102	3
d) Violation of Detention Ord.	17	1	16	3	8	0	41	4
e) Violation of Custom Excise Ord.			0	0	6	1	6	1
f)Gambling	86	18	110	10	108	8	304	36
g) Violation of Municipal By-Laws	11		4	0	8	1	23	1
h) Traffic Offence	26	3	33	1	53	4	112	8
i) Others*	531	30	493	25	450	28	1474	83
Total	3740	136	3660	103	3792	109	11192	348

[⊗] Source: Tables in Bahasa Malaysia were provided by the Department of Social Welfare, Kuala Lumpur Malaysia.

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* Includes Cases of:

1. Dangerous Drugs Ordinance
2. Poison Ordinance
3. No Identification Cards
4. Prevention of Corruption Act
5. Explosive and Dangerous Weapons Act
6. National Registration Act
7. Minor Offence Act
8. Playing of Firecrackers

Table 4.1 demonstrates that most of the juveniles, who were placed on probation were convicted for offences against property, person, sex and other offences. In 1990 74% males and 2% females; in 1991 74% males and 2% females. While in the year 1992 74% males and 1.7% females were found guilty of offences against property. In the same years 7.4% males and 0.1% females, 7.2% males and 0.02% females and 8.3% males and 0.05% females respectively were found guilty of offences against persons. The other largest group of offender constituted of other offences. In this category in the year 1990 14.1% males and 0.8% females in the year 1991 13.4% males and 0.6% females while in the year 1992 11.8% males and 0.7% females were found guilty of offences in the statutes. These figures indicate that there has been a slight increase in the offences against property and person. However, the adjudication in other statutes has shown a slight decrease.

TABLES 4.2: TOTAL NO. OF JUVENILE CASES ACTION HAS BEEN TAKEN ON SERVICE AND SEX

Table 4.2a: Probation Hostel

PROBATION HOSTEL	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
a) Cases Beginning of Year	691	22	835	33	856	44	2382	99
b) New cases in year	463	29	400	36	540	18	1403	83
c) Cases Closed	319	18	379	25	325	10	1023	53
d) Cases at the end of year	835	33	856	44	1071	52	2762	129

Table 4.2b: Supervision

SUPERVISION	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
a) Cases Beginning of Year	245	103	251	134	283	191	779	428
b) New cases in year	128	82	147	102	166	101	441	285
c) Cases Closed	122	51	115	45	88	51	325	147
d) Cases at the end of year	251	134	283	191	361	241	895	566

Table 4.2c: Release Under Licence*

RELEASE UNDER LICENCE	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
a) Cases Beginning of Year	228	32	170	23	216	37	614	92
b) New cases in year	151	31	223	38	153	26	527	95
c) Cases Closed	209	40	177	24	177	25	563	89
d) Cases at the end of year	170	23	216	37	243	38	629	98

* The Ministry of Social Welfare has constituted a Board to review the cases of the juveniles detained under various institutions established by the Ministry. This Board can release the inmates of these institutions under licence.

Table 4.2d: Further Supervision*

FURTHER SUPERVISON	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
b) Cases Beginning of Year	247	43	230	43	226	46	703	132
b) New cases in year	225	52	199	41	186	43	610	136
c) Cases Closed	242	52	203	38	166	45	611	135
d) Cases at the end of year	230	43	226	46	246	38	702	127

* In some cases, if it is feared that the probationer may relapse into the life of crime after discharge from probation service, as a follow-up measure he may be required to remain under supervision for a period of one year.

Source: Tables in Bahasa Malaysia were provided by the Department of Social Welfare, Kuala Lumpur Malaysia.

The data of Table 4.2a reveal that in the year 1990 males numbering 835 and 33 females, while 856 males and 44 females in 1991 and 1071 males and 52 female offenders in 1992 were committed to Probation Hostels. These figures show that there has been an increase of 8.5% from 1990 to 1992 in committals of the juveniles by the courts to probation hostels.

The data of Table 4.2b shows that during the year 1990 males numbering 251 and 134 females, and 283 males and 191 females in the year 1991 and 361 males and 241 females in 1992 were placed under supervision of probation officers.

Table 4.2c illustrates that in the year 1990 males numbering 170 and 23 females, and 216 males and 37 females in the year 1991 and 243 males and 38 females in the year 1992 were released under license by the Review Board of the Ministry of Social Welfare. In these years there has been an increase of 11.6% of the offenders released under license.

Under Table 4.2d in the year 1990 males numbering 230 and 43 females; and 226 males and 46 females in the year 1991 and 246 males and 38 females in the year 1992 were placed under further supervision of the probation officer. There has been a slight increase of 2.3% in placing offenders under further supervision.

Tables 4.2 reveal that there has been a significant improvement in the use of probation in the cases of juveniles. This improvement is evident from the fact that the Courts are quite aware of the ill effects of imprisonment particularly the short term imprisonment. Therefore, they have resorted to this type of treatment program in the cases of juveniles.

TABLE 4.3: TOTAL No. OF ADULT CASES ON PROBATION

PROBATION HOSTEL/SUPERVISION								
	1990		1991		1992		TOTAL	
	M	F	M	F	M	F	M	F
a) Cases beginning of the year	117	0	68	0	41	0	226	0
b) Cases end of the year	24	0	42	2	85	4	151	6
c) Cases closed	78	0	69	2	66	4	213	6
d) Cases end of the year	63	0	41	0	60	0	164	0

Source: Tables in Bahasa Malaysia were provided by the Department of Social Welfare, Kuala Lumpur Malaysia

Table 4.3 deals with the cases of adult offenders (18-21 years). In the years 1990, 1991 and 1992, male offenders numbering 117, 68 and 41 respectively were placed under supervision of probation officer/hostel. The number of the probationers is low owing to the fact that in many cases the Courts were not willing to use probation if the offence was serious in nature.

TABLE 4.4:CASES ENDED BASED ON SUCCESS AND FAILURE

KIND OF SERVICE	SUCCESS			FAILURE		
	1990	**1991**	**1992**	**1990**	**1991**	**1992**
a) Probation Hostel	294	353	306	32	26	24
b) Supervision	134	95	121	20	18	12
c) Release Under Licence	212	168	126	27	22	19
d)Further Supervision	250	208	160	29	18	29
Total	890	824	713	105	84	84
Adult Supervision	74	13	23	**0**	**0**	**0**
Total	964	837	736	105	84	84

Source: Tables in Bahasa Malaysia were provided by the Department of Social Welfare, Kuala Lumpur, Malaysia

Table 4.4 highlights the success and failure of probation in the cases of juveniles and adult offenders. The data point out that during 1990-1992 out of the total number of juveniles sent to probation hostels, 953 (39.2%) of them successfully completed their stay at the hostel while only 82 (0.33%) failed.

During the same period 350 (14.4%) juveniles completed their supervision period successfully and only 50 (2.06%) failed. In the same period 506 (20.8%) juveniles released under licence successfully completed their licence period while only 68 (0.28%) failed. During the same year 618 (25.4%) juveniles successfully completed their further supervision period and only 76 (3.1%) failed to complete their supervision period.

The figures of adult probationers (18-21 years) are very encouraging. 110 adult probationers successfully completed their supervision period during 1990-1992 and *none* of them failed.

In Malaysia the Courts are sceptical in using probation in the cases of adult offenders. The success rate in the cases of adults show that they can go well if granted probation.

4.6 PROBATION IN INDIA

In India, the first statutory provision dealing with probation is traceable to Section 562 of the Criminal Procedure Code 1898. This provision partially incorporated the principles of the probation system. However, the need for legislation on probation was long-felt. The Indian Jails Committee recommended in 1919 a comprehensive legislation on probation. After the introduction of provincial autonomy by the Government of India Act in 1935, several provincial governments enacted State Probation Laws. Bombay seems to have been the first to enact the law in 1938. It was followed by U.P. First Offenders Probation Act 1938. But these laws only touched a fringe of the problem, whereas several other states had no legislation at all.

After independence Dr. W.C.Reckless, a well known criminologist was invited under the U.N. Assistance Programme to study the Prison Administration. He surveyed various jails in India, and in his report, he stated:

> There is good evidence to show that Probation supervision as an alternative to jail sentence is the best most satisfactory and the most economic way of handling the juveniles and adult offenders. In any case, more persons should be placed on probation and supervision by Courts than are sentenced to jails, borstals and certified schools.

In 1958, the Indian Parliament enacted a comprehensive law, The Probation of Offenders Act 1958 to bring about uniformity in the probation laws in the country. This Act was hailed by the Supreme Court of India in *Rattan Lal v. State. of Punjab*[50], as a milestone in the progress of modern liberal trend of reform in the field of

[50] A.I.R 1965 SC. 444

penology. It is a result of the recognition of the doctrine that the object of criminal law is to reform the individual offender than to punish him. This Act applies not only to young persons but also to other offenders. However, the Act distinguishes offenders below 21 years of age and those above that age and, offenders who are guilty of having committed offences punishable with death or imprisonment for life and those who are guilty of lesser offences. While in the case of offenders who are above the age of 21 years absolute discretion is given to the Court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the Courts not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender, it is not desirable to deal with them under the Probation of Offenders Act[51].

4.6.1 Law

As discussed earlier, in India the law concerning probation is contained in the Criminal Procedure Code, the various other state legislation and the Probation of Offenders Act 1958. The salient features of the Act are as follows.

Under Section 3 of the Act, a person of any age can be released on admonition[52]

1) If he has committed any offence punishable under Section 379, 380, 381, 404 or 420 of the Indian Penal Code.

[51] Ibid.

[52] The word admonition is derived from Latin. In Latin "admoners" conveys the same meaning, "ad" means "to" and "monere" means to warn meaning thereby to warn; to reprove mildly, kind reproof. For a detailed discussion see *Vaghari Jenabhai Asabhai v. Vaghari Jesabngbhai Ugrabhai and others,* 1992 Cri. L. J. 881.

2) If he has committed any offence punishable with imprisonment for not more than two years or with fine or with both under the Indian Penal Code or any other law.
3) The trial Magistrate is expected to take the circumstances and nature of the offence and character of the offender into consideration.

The object of this section is to offer an alternative to the Courts so that in a deserving case of first offenders, the Courts may offer the offenders a further chance to turn into a new leaf in life. To send these persons to jail would have the effect of turning them into habitual offenders. This section stands as a boon to those who might have committed crime as a result of ignorance or due to the influence of others but for such lapses otherwise they are good citizens. The application of this section is not confined to juveniles. It equally applies to adult offenders. But, in the case of juveniles before passing an order under this section, the trial Court should guard against two things:

1) The danger to the public and
2) The danger to the accused himself.

The public must not be led to suppose that juvenile offenders may commit any crime that they like without any fear of punishment; because this will serve as an incentive to criminal minded parents to initiate their children into the life of crime. The danger to the children is that if they find they themselves immune from fear of punishment, they might go astray into the life of crime. It is obvious therefore before applying this provision of the Act in any particular case, it should be considered whether there is a fit case for its application or not. Where the Court is of the view

that the probation officer will not be able to control or supervise the activities of the offender it should not grant release on probation[53].

Section 3 of the Probation of Offenders Act 1958 corresponds to Section 360 of the Cr.P.C. A comparison of Section 3 of the Act and Section 360 of the Cr.P.C. shows that the former is much wider than the latter, because under Cr.P.C. the Court may release an offender on probation if the offence committed by the accused is theft, cheating, dishonest misappropriation under the Indian Penal Code bearing punishment of not more than two years while the application of Section 3 of the Act may be considered for the offences punishable under any other law and it is not confined to offences under the Penal Code.

Section 4 of the Act empowers the Courts in appropriate cases to release any offenders on probation of good conduct instead of sentencing him at once to any punishment. Any offender including a recidivist is eligible to probation under this section in respect of practically all offences except those in which, punishment is either death or imprisonment for life. Previous conviction is not made a condition precedent for application of this section. However, Courts are expected to exercise care in selecting cases for probation. To release persons on probation where circumstances do not justify it imposes unnecessary burden on the probation officer and discredits the system. In addition to considering the surrounding circumstances and past history of the offender, the Court, has to be satisfied that having regard to the circumstances of the case including the nature of the case and character of the offender, it is expedient to release such a person on probation.

[53] Baldev Raj v. State of Punjab, 71 Punjab Law Review (1961) p.51.

This section makes no distinction between persons below or above 21 years of age and is applicable to all persons irrespective of age subject to two conditions. Firstly, the offence committed should not be punishable with death or imprisonment for life. Secondly, the circumstances of the case including the nature of the offence and the character of the offender shows a fit case for probation. The power to release the offender on probation under the Probation of Offenders Act is discretionary. Nevertheless, an important injunction has been let down under Section 6 of the Act not to impose a sentence of imprisonment on offenders below 21 years of age[54]. In case the Court feels inexpedient to release an offender on probation of good conduct, it shall record the reasons for doing so. Section 361 of the Cr.P.C. provides that the Court shall record its reasons in its judgement for not releasing the eligible offender on probation[55].

In order to ensure that the offender released on probation conducts himself properly, the Act enables to pass a supervision order directing such an offender to remain under the supervision of a probation officer named in the order during such a

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[54] Section 6 of the Act reads as follows:

i) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that having regard to the circumstances of the case including the nature of the offence and character of the offender, it will not deal with him under Section 3 or Section 4 and if the Court passes any sentence of imprisonment on the offender it shall record its reasons for not doing so.

ii) For the purpose of satisfying itself whether it would not be so desirable to deal under Section 3 or 4 with an offender referred to in Sub-section (1), the Court shall call for a report from the Probation Officer and consider the report, if any, and other information available to it relating to character and physical and mental conditions of the offender.

[55] Section 361 Special Reasons to be recorded in certain cases:

a) Where in any case the Court should have dealt with an accused under Section 360 or under the Probation of Offenders Act, 1958 (20 of 1958); or

b) A youthful offender under the Children Act, 1960 (60 of 1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders., but has not done so, it shall record in its judgement special reasons for not having done so.

Section 19 of the Act confines the operation of Section 562 of the Code to the area of application of the Act, The provisions of Section 360 of the New Code which are the same as those of Section 562, do not apply where the Act has been enforced. Therefore, the court is bound to assign reasons for not granting probation under the Act only.

period not less than one year and not more than three years[56]. The Court while making such supervision order should require the offender to enter into a bond with or without sureties to observe conditions specified in such an order and such additional conditions with respect to residence, abstention from alcoholism, etc., as the Court may consider fit to impose having regard to the circumstances of the case and for preventing a repetition of the same offence or the commission of other offences by the offender[57]. The Court making probation order shall explain to the offender the terms and conditions of the order and furnish a copy of the supervision order to the offender, the sureties if any, and the probation officer concerned[58].

The Act also provides a procedure in cases where the probationer fails to comply with the requirements of the probation order. Upon non-compliance of any of the requirements of the probation order, the Court passing the order may summon the probationer to appear before it. If the Court, after hearing the case is satisfied that the offender has failed to observe any of the conditions of the bond or bonds entered into by him, he may sentence him for the original offence, and if the failure is for the first time, then without prejudice to the continuance of the probation order, impose upon him a penalty not exceeding fifty rupees[59]. If the penalty imposed is not paid within such period as the Court may fix, the Court may sentence the offender for the original offence[60].

The Court may vary conditions of probation if it appears to the Court that in the interest of the offender and public, it is expedient or necessary to do so. It may at any

[56] Section 4 of the Probation of Offenders Act 1958.
[57] Sub Section 4 of Section 4 of the Act.
[58] Sub Section 5 of Section 4 of the Act.
[59] Section 9 of the Act.
[60] *Ibid* Section 4 of the Act.

time during the period of the bond vary, extend or diminish the duration or altering the condition or by inserting additional conditions. Before making any such variation the probationer will be given an opportunity of being heard[61]. Identical provisions are found under English law, if the probationer fails to observe any of the conditions of probation order, he is to be brought before the supervising Court or the Court which made the order[62].

4.6.2 The Judicial Approach

The Supreme Court of India highlighting the above mentioned purpose of the Act observed in *J.K.Prasad v. State of Bihar*[63] that the Act is designed to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age in case the youthful offenders are sentenced to undergo imprisonment in jail. This object is in consonance with the present trend in the field of criminology, according to which effort should be made to bring about correction and reformation of the individual offenders and not to resort to retributive justice[64]. Modern criminal jurisprudence recognises that no one is a born criminal and a good many crimes are the product of socio-economic milieu. Although not much can be done for hardened criminals, considerable stress has been laid on bringing about the reform of young offenders not guilty of serious offences and of preventing their association with hardened criminals.

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[61] Section 8 of the Act.

[62] See Section 6 of the Power of the Criminal Court Act 1973. This Section provides following methods under which the offender has to be dealt with

(a) The Court may impose a fine on the delinquent probation up to £50;
(b) A community service order subject to certain conditions made,
(c) Court may order him to attend an attendance centre, and
(d) Court may deal with him in the manner it would have dealt with for original offence.

[63] A.I.R 1972 SC. 2522.

[64] *Ibid.*

In this case, the question for determination before the Supreme Court was whether the appellant who was less than 21 years of age on the date of his conviction, for an offence under Section 326 read with Section 149 of the Indian Penal Code can claim the benefit of Section 6 of the Probation of Offenders Act. It was held by the Supreme Court that plain reading of Section 6 of the Act makes it manifest that it deals with persons under 21 years of age who are found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life. As the offence under Section 326 read with Section 149 of the I.P.C. can also be punishable with imprisonment for life, a person found guilty would not be entitled to invoke the benefit of Section 6 of the Probation of Offenders Act.

In *Abdul Qayyum v. State of Bihar*[65], the appellant appealed to the Supreme Court against the judgement of the High Court for the denial of the benefit of the provisions of the Probation of Officers Act. He was convicted for an offence under Section 379 of the Indian Penal Code and sentenced to rigorous imprisonment for six months. At the time of the commission of the offence the appellant was sixteen years of age and at the time of conviction he was about 18 years. Before sentence was passed on him, it was prayed that he, be released on probation under Section 6 of the Probation of Offenders Act and no sentence be imposed on him. The trial Court called for a report from the Probation officer in respect of the appellant and another accused. The Probation officer recommended that the appellant should be given the benefit under the Act. This recommendation was rejected by the trial Court.

[65] A.I.R 1972 SC. 214.

While rejecting the recommendation of the Probation officer, the trial Court observed that the provisions of the Probation of Offenders Act cannot be extended to the appellant because he is associate of another accused Shammim, who is a hardened criminal and a person of doubtful character. Having regard to the facts and circumstances in which the accused Qayyum was caught, he does not deserve the benefit of Section 4 of the Act.

He appealed to the High Court. Rejecting the appeal, the High Court held that the trial Court was justified in not granting the benefit under the Act because of "the association of the petitioner with such a hardened criminal and a pick pocket."

On appeal the Supreme Court held that neither the trial Court, nor the High Court applied their mind to the requirement of the provisions of the Probation of Offenders Act. It is true that these Courts did consider the question of giving benefit to the appellant under Section 6, but they completely misdirected themselves to the essential requirements of the provision. The High Court thought that the appellant was an associate of Shammim. The probation officer's report did not show any such association of the appellant with the accused. Rather the report showed that he was 18 years of age and physically and mentally normal. He was interested in his work. The attitude of the family towards the appellant was one of sympathy and affection and the father exercised reasonable control over him. The report of the probation officer also stated that there was no report against character of the offender, no previous conviction has been proved against him prior to this case and in the circumtances mentioned by the probation officer in his report the release on probation may be a suitable method to deal with him.

The Supreme Court held that this report does not justify the conclusion that the appellant is either a hardened criminal or is associated with hardened criminals for denying him the benefit of the provisions of the Act. To sentence him to imprisonment would itself achieve the object of associating him with hardened criminals, which association the Courts thought was a good ground for denying him the benefit of being released on probation. There is no doubt that if he is released on probation of good conduct there is hope of his being reclaimed and afforded the opportunity to live a normal life of a law abiding citizen.

The Courts in India are aware of deleterious effects of jail life on the short-termers. They are of the view that if offenders are given a chance they would reform and lead a new chapter in life. Many of them are first and youthful offenders. Association with hardened criminals in jail might make their redemption impossible. Even a short spell might destroy the person irretrievably. Probation of Offenders Act makes comprehensive provision for the reformation and rehabilitation of offenders.

In *Sandhakar Sahu v. State of Orissa*[66], the petitioner was convicted under Section 324 of the Penal Code and was sentenced to undergo rigorous imprisonment for three months. On appeal to the High Court, the question raised by the learned counsel for the petitioner was that the sentence of rigorous punishment for three months imposed on the petitioner was legally defective due to the failure of the Courts below to apply to the petitioner the provisions contained in the Probation of Offenders Act 1958. It was further submitted by the defence counsel that where there has been much advance in the field of penology, in the attitude of the society, in the

[66] 1985 Cri.L.J. 1591.

prescription of the law vis-à-vis an offender, the Courts should not lag behind and administer in a mechanical and heartless fashion. The learned judge of the High Court agreed with the submission of the learned counsel of the petitioner and held that it was certain that the petitioner was a first offender and no previous conviction had been proved against him. This was a fit case for probation. The petitioner had already suffered imprisonment pursuant to the sentence imposed for 25 days. He surrendered to the sentence to satisfy the rule framed by the High Court that unless a person sentenced to substantive imprisonment surrenders to the sentence his revision would not be placed for admission though in suitable cases, the petitioner may be granted exemption. The petitioner has already suffered imprisonment. Injustice would be compounded if the petitioner was placed for treatment under the Probation of Offenders Act. The conviction imposed by the trial Court was maintained but, the sentence was reduced to the period already undergone. The petitioner was set at liberty.

This case shows that while sentencing the offender the Courts fail to consider all the available methods of punishment. Sentencing the offender is the last and the most difficult stage in a trial. It involves sensitive exercise of discretion and not a routine or mechanical prescription or hunch. The Court should exercise discretion judiciously. In this case all the factors were in favour of the grant of probation to the petitioner. The report of the probation officer was very encouraging. The denial of probation unnecessarily resulted in the short detention of the petitioner in prison.

Seriousness of offence is no bar to the grant of probation. The only criteria is whether the probationer has conducive atmosphere in the community where he is placed. In *Masarullah v. State of Tamil Nadu*[67], the appellant was convicted by the High Court for offences under Section 397 and 452 of the Indian Penal Code and was sentenced to 5 and 7 years' imprisonment respectively. According to the probation officer's report at the time of the commission of the offence he was below 21 years of age and was serving as a carpenter in a company. His father was a retired school teacher and his brothers and sisters were well settled. He fell into undesirable company and came under evil influence of movies and committed the crime. His parents were keen to improve him and ready to supervise and exercise control over him. Although the offences committed by the appellant were not punishable with life imprisonment, the High Court rejected the request for giving benefit under Sections 6 and 4 of the Probation of Offenders Act, for the reasons that the appellant had committed the crime of a daring and reprehensible nature in a planned manner. On appeal to the Supreme Court the question for consideration was whether the accused should be condemned to 7 years imprisonment to make him a hardened criminal or he can be reclaimed by giving him the benefit of the provisions of the Probation of Offenders Act 1958.

The Supreme Court allowed the appeal and held that in the case of an offender under the age of 21 years on the date of commission of the offence, the Court, is expected ordinarily to give the benefit of the provisions of the Act and there is embargo on the power of the Court to award sentence unless the Court considers otherwise, having regard to the circumstances of the case including that nature of the

[67] 1982 3 SCC 458.

offence and the character of the offender and reasons for awarding sentence have to be recorded[68].

The Supreme Court further held that the report of the probation officer was quite detailed. It showed that the appellant was below 20 years of age on the date of the commission of the offence. He belonged to the lower middle class but to a respectable family having an atmosphere of educational culture. In his reformative impressionable years, he comes under the undesirable influence of movies eulogising crime and showing criminal daring persons. This young man falls a prey and a victim. He emulates his hero of the movie the latent psychopathic background of which led him astray. Therefore, having regard to the nature of offence, the character of the offender, and the attendant and surrounding circumstances as revealed in the probation report and being influenced by the modern trend of reclamation of offender rather than condemnation, this is a pre-eminently fit case to grant the benefit of modern penological approach as enacted in the Act.

In *Hotel Alankar (P) Ltd. v. S.P.Nanda*[69] the respondent had faced proceedings initiated by the High Court of Orissa suo moto being prima facie satisfied from the avernments made by the petitioner arising out of a Court order about commission of criminal contempt by the respondent (Managing Director of Orissa State Financial Corporation) in as much as the acts and words attributed to him to lowered the authority of the High Court.

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[68] Ibid

[69] 1992 Cr. L. J. 1788.

The allegation made by the petitioner against the respondent was that when she had gone to the office of the corporation with a certified copy of the Court's order along with a banker's cheque for Rs10000 and had met Shri Nanda, the respondent in his office and requested him to act in accordance with the Court order after going through the certified copy of the order, he suddenly flared up and contemptuously threw away the certified copy and banker's cheque on the face of the petitioner and in a very angry and loud voice asked the petitioner to go out. It was alleged that the respondent had also uttered very harsh and disparaging remarks against the entire judiciary in general. The respondent denied meeting the petitioner on that day in his office and making any contemptuous remarks about the said Court. However the Court did not accept the contention of the respondent and on the basis of the evidence by both the parties found the respondent guilty of criminal contempt. However, the Court considered the contumacious conduct of the respondent the outcome of strong impulse and gave him the benefit of Section 3 of the Probation of Offenders Act as no previous conviction had been proved against him and the circumstances of the case including the nature of the offence and the character of the offender so demanded.

The Courts have emphasised that sentencing an accused is a sensitive exercise of discretion. They are required to collect material necessary to award just punishment and also to apply its mind to the facts and circumstances to the case whether an accused can be given the benefit of the provisions of the Probation of Offenders Act.

In *Mann Prakash, petitioner v. State of Haryana*[70], the petitioner was charged and convicted under Sections 279, 337, and 304-A of the Indian Penal Code. He was

[70] 1996 Cr. L. J. 663.

sentenced to undergo rigorous imprisonment for six months for the first two offences and two years imprisonment for the last offence.

On a petition to the High Court it was submitted on behalf of the petitioner that he has been incorrectly denied the benefit of releasing him on probation under Section 360 of the Cr.P.C. or under the provisions of the Probation of Offenders Act. The submission of the counsel for the petitioner was that the petitioner was the sole bread earner of the family and had already undergone a substantial part of the sentence. It was also brought into the notice of the Court that parties had also settled their claims before the Motor Accidents Claims Tribunal.

The learned judge of the High Court found some force in the submissions of learned counsel for the petitioner and held that the purpose of providing benefit to an accused under the aforementioned provisions is primarily to give another chance to the accused to improve his conduct and to live as a better human being in the society. The seriousness of the offence, the conduct of the accused and the likelihood of his repeating the offence are the basic criteria which would normally weigh with the Court while granting or refusing such benefit to the accused. The learned judge further held that keeping in view of the circumstances of the case it is desirable that the petitioner should be released on probation. A number of persons are dependent upon the petitioner. He is a first offender and belongs to a poor family. There is no complaint of his conduct during the trial. The parties had also settled their dispute. He had already undergone part of the sentence. Consequently, the petitioner was released on probation for a period of three years under Section 360 of the Criminal Procedure Code read with the provisions of Section 4 of the Probation of Offenders Act on his furnishing a bond, for the said period, for keeping a peace and be of good behaviour.

4.7 THE FINE

Fine is a preliminary penalty imposed upon a person adjudged guilty of crime. It has been the most commonly used of all the penalties available to the Criminal Courts in Western and Eastern civilizations[71].

Imposition of fine as a sentence for offences in the Indian and Malaysian Penal Code has been dealt with in the following ways.

i) Offences in which fine is the sole punishment and the amount of fine is limited[72].

ii) Offences in which it is an alternative to imprisonment but its amount is limited.

iii) Offences in which it is in addition to imprisonment and the amount of fine is unlimited[73].

Fine as an alternative to short term imprisonment is an important non-custodial penalty available to the Courts in Malaysia and India but insufficient attention has been paid to it. What useful correctional purpose can it serve? Although fine is not a modern invention in the field of correction there has been a marked increase in the use of fine in most countries of the world[74]. This fact is borne from the fact that in India the imposition of fine increased from 81.5% in the year 1911 to

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[71] Caldwell R.G. *Criminology*, New York, the Ronald Press Company (1956) p.426.

[72] Under ss. 137 and 154 of the Malaysian and Indian Penal Code, the fine is the sole punishment and the amount of fine is limited.

[73] Under ss. 155 and 156 of the Malaysian and Indian Penal Code the amount of fine is unlimited. However, section 63 of the Indian Penal Code and Sections 283(1)(a) of the Malaysian Criminal Procedure lay down where no sum is expressed to which a fine may extend the amount of fine to which the offender is liable, shall not be excessive. These provisions vest discretion in the judge to fix any amount of fine depending on the circumstances of the case but it is expected not to impose unreasonable or excessive fine.

[74] The English statistics show that fines were imposed on 95% of offenders who were guilty of non-indictable offences. This percentage went even higher to 98% in motoring offences and 89% of those found guilty of other non-indictable offences-See Non-Custodial and Semi-Custodial Penalties, Report of the Advisory Council on Penal System, London, Her Majesty's Stationary office (1970) p.5.

89.18% in 1961. In other words in 90% of the Criminal cases, fines were imposed[75].

A good number of offenders who are unable to pay fine are sent to prisons to serve short-term imprisonment. The presence of short-termers in prisons makes it difficult to implement rehabilitative measures. In this part of the chapter it is proposed to discuss the advantages and disadvantages of fine, ability of the offender to pay fine, payment of fine, imprisonment in default of fine, installments of fine in place of default imprisonment, fine as a substitute for short term imprisonment. An appraisal has also been made of the use of fine by the Courts in Malaysia and India.

4.7.1 Advantages of Fine

The fine is the most important non-custodial sanction, being far the most frequently used sentencing option in the Malaysian and Indian Courts. The wide use of fine as a criminal sanction is justified on various grounds, which are given below:

i) It provides an alternative to imprisonment, which can be readily fixed in accordance with the offender's means and seriousness of his offence.

ii) By contrast with other forms of sentence such as capital punishment, flogging or imprisonment, fine can be reversed, if any injustice has been done for it can be repaid.

iii) Fine is the most economic penalty to the community as it is not administratively expensive to impose.

iv) The fine generates revenue for the State, which can in turn apply these funds to compensate victims of crime.

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[75] Chabbra K.S. *Quantum of Punishment in Criminal Law in India*, Chandigarh, Publications Bureau Punjab University (1970) p. 203.

v) From the offender's point of view the imposition is useful. It avoids a prison term being served. This helps to ensure that the risk of graduating to more serious offences in the association of hard core criminals is avoided.

vi) The fine is correctionally advantageous as it keeps the offender in the community and does not carry with it any public stigma and disgrace that imprisonment does, and therefore it helps in the reformation of the offender.

Bentham in his Principles of Penal Laws[76] advocates fine and lists the following advantages:

1. It has the striking advantage of being convertible into profit.
2. It can be regulated according to the means of the offender.
3. It implies no infamy.
4. It is reversible so that complete separation can be made for an unjust sentence
5. It is popular punishment.

The Law Commissioners of the Indian Penal Code appreciating the efficacy of fine observed:

> "We are satisfied that if offenders are allowed to choose between imprisonment and fine, fine will lose almost its efficacy on those who dread it most. We, therefore, propose that imprisonment which an offender has undergone shall not release him from the preliminary obligation under which he lies[77]"

It is the main reason that fine has been provided as an important penalty for most of the offences punishable under the Penal Code and other local laws either exclusively or alternatively or in addition to other penalty[78].

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[76] Part II Book III pp. 467-70, cited in Nigam R.C. *Law of Crimes in India*, , New York Asia Publishing House (printed in Delhi) (1965) p.244

[77] supra note 75.

[78] Ibid

As observed in the previous chapters, short-term imprisonment does not serve useful purpose, fine can be used as a substitute. At the Hague Conference in 1951, the social, economic and domestic drawbacks of imprisonment were considered. After due deliberation of these drawbacks it was suggested that as far as possible fine should be imposed as a substitute for short-term imprisonment[79].

The Indian Jails Committee of 1919-20 also criticized the use of short-term imprisonment and advised the Magistrates to refrain from imposing short-term imprisonment and instead advocated the use of fine as a substitute for short-term imprisonment[80].

4.7.2 Disadvantages of Fine

Besides certain advantages, there are certain limits on the effectiveness of fine, which are as follows:

(a) The fines are adjusted to the offence and therefore imposition of fine can create inequalities. The impact of fine as a penalty is relatively small to wealthy offenders whereas it may be relatively harsh to poor offenders and in some cases they may be sent to prison in default of fine.

(b) Fines are ineffective in many types of cases in which they are traditionally applied. Many offenders are committed under the influence of drug, alcohol and so on, imposition of fine in such offences hardly serve any utilitarian purpose.

(c) Fine is generally not sufficient to upset the financial gains from the offence. Gamblers and smugglers, for instance, hardly abandon their criminal activities

[79] Id. p. 203

[80] Singh M.K.S., *Fine and Correctional Administration* in *Criminal Law, Criminology and Criminal Administration* ed. Gaur K.D., Delhi, Deep and Deep Publications (1992) p. 599.

because of fine[81], rather they gear up their activities to recover what they might have been forced to pay as a fine.

(d) Another problem associated with fine is that it does not only affect the offender himself, but their chief sufferers are parents, dependants and friends who often bear the burden. A fine is not the appropriate sentence unless there is likelihood that the burden will be borne by the offender himself[82].

The objections are serious but they are primarily pointed towards the evil, which have crept in the administration of fine. Fines can play an important role in the sentencing system if they are used with discrimination. They can be useful in handling cases of minor offenders who have been involved in careless infractions of law to which no serious stigma is attached[83].

4.7.3 Offender's ability to pay fine

We have considered various steps that may be taken to improve fine as an effective means of sentence. One suggestion which is very often put forward is that fine should be related more accurately to the offender's ability to pay[84]. The amount of fine imposed should be within the means of the accused to pay though he must be made to feel the pinch of it[85]. An offender who cannot pay any reasonably appropriate fine or who cannot pay it without hardship to his dependants may be sentenced to any other non-custodial penalty such as probation.

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[81] Ibid.
[82] Criminal Law and Penal Methods Reform Committee of South Australia, First Report, Sentencing and Corrections, (1973) p. 148.
[83] supra note 80-p. 581.
[84] Ian Maclean and Peter Monish, Harris's Criminal Law, London Sweet and Maxwell Ltd. (1973) p.776.
[85] Jivan Trikam v. Kutch Government A.I.R. 1950 Kutch 73.

In *Tan Kah Eng v. Public Prosecutor*[86] the appellant, a seamstress aged 17 years, was convicted of assisting in carrying on a public lottery contrary to Section 4(1)(c) of the Common Gaming House Ordinance 1961 and sentenced to a fine of $3000 or in default six months imprisonment. She appealed against sentence. At the time her appeal was heard she was maidservant earning $50 per month. On appeal it was held that the fine of $3000 was manifestly excessive; a fine should always be related to the means of the offender; the imposition of the fine beyond the appellant's means or six months imprisonment in default of payment was tantamount to sentencing the appellant to six months imprisonment without the option of fine.

The Supreme Court of India in *Adamiji Umar Dalal v. State*[87] also laid down that while imposing fine, it is necessary to have as much regard to the pecuniary position of the offender as to the character and magnitude of the offence.

Imposing fine on the offender's ability to pay has merit. A rich person convicted of an offence may be imposed fine ten times more than a resourceless person may. If rich or influential persons are too lightly dealt with though they are guilty, respect for law and order will be seriously impaired[88]. A fine should not be too excessive as to ruin completely the persons on whom it is imposed and make them mere outcasts in the country and potential criminals through the urge of necessity. The wealth and poverty of an accused are factors, which should be considered on almost every occasion in assessing fines[89].

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[86] (1965) 2 MLJ 272.
[87] A.I.R. 1952 S.C. 14; also see State V. Krishna Pillai 1953 Cri. L.J. 1064.
[88] State v. Basappa (1953) Cri. L.J. 1064.
[89] [1937] MLJ Rep. 171.

In the cases in which it is really necessary to impose fine, the Court should take into consideration not only financial circumstances of the offender, but also the profit arising from the offence, and the value of the subject matter as well as the amount of injury caused by the act of the accused. In *Zakaria Bin Musa v. Public Prosecutor*[90], the appellant was charged for theft of a motor car in the Magistrate's Court. He pleaded guilty to the offence charged and was sentenced to 2½ years imprisonment and a fine of $3000 or in default six months imprisonment. On appeal, it was contended by the counsel for the appellant that the sentence was manifestly excessive, as the maximum sentence for theft was three years. It was further submitted that the appellant was a security guard and has been dismissed from his job and was unable to pay the fine. The learned judge agreed with the submission of the learned counsel and held that if it was really necessary to impose a fine in addition to the custodial sentence, then the trial Magistrate should have taken in to consideration, the financial circumstances of the appellant, the profit arising from the offence, the value of the subject matter and the amount of the injury, if any inflicted.

4.7.4 Imprisonment in default of fine

One common problem in imposition of fine, which very often arises, is when the offender fails to pay fine. The failure to pay may be due to unwillingness to pay, or due to lack of resources. Default in payment may land him in jail where the fine is the only punishment prescribed by the law. Though in the circumstances of the case, imprisonment may not be required in the case of a particular offender but nevertheless it is imposed on him.

[90] [1985] 2 MLJ 221; also see R*ex v. Teo Woo Tim* (1932) MLJ 124.

Section 64 of the Indian Penal Code[91] and Section 283 (1)(b)(4) [92], of the Malaysian Criminal Procedure Code confer powers on the Court to impose sentence of imprisonment in default of payment of fine in cases wherein the sentence of fine might have been imposed.

The use of this provision creates hardship to those offenders who are unable to pay the sum of fine due to some individual factors. Due to non-payment, the offender is put behind the bars. His personal factors are completely ignored. The objective that the sentence of fine should be used in preference of imprisonment is defeated.

The imprisonment, which is imposed in default of payment of fine, shall terminate whenever the fine is either paid or levied by the process of law[93]. Whenever after imposing the sentence of fine on the offender, it appears to the Court that the offender is not in a position to pay, the Court passing sentence may take action for the recovery of fine as a civil debt. It may take the following actions;

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender.

(b) issue a warrant to the collector of the district authorising him to realise the amount by execution according to civil process against the movable or immovable property or both of the defaulter: Provided, that if the sentence

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[91] Section 64 reads as follows:
"....It shall be competent to the Court which sentence such offender to directly the sentence that, in default of payment of fine, the offender shall suffer imprisonment for a term, which imprisonment shall be in excess of any other imprisonment to which he may be sentenced or to which he may be liable under commutation of sentence.

[93] See Section 68 of the Indian penal Code and Section 283(1)(b) of the Malaysian Criminal Procedure Code.

directs that in default of the payment of fine the offender shall be imprisoned and if such offender has undergone the whole of such imprisonment in default, no court shall issue such a warrant unless for special reasons to be recorded in writing if it considers necessary to do[94].

The provision of the Indian Criminal Procedure is wider than the provision of the Malaysian Criminal Procedure. It gives power to the Court to recover fine in case default is made. This provision can also be used to reduce pressure on prison populations. Those offenders who show their unwillingness to pay fines may be subjected to the above process.

4.7.5 Instalment of fines in place of default imprisonment

As we have observed earlier, many offenders are committed to prison, as they are unable to pay fine. The statutory laws of Malaysia give a discretion to the Court to allow payment by instalment. Section 283 (1)(b) of the Malaysian Criminal Procedure Code provides that in every case of an offence in which the offender is sentenced to pay a fine, the Court passing a sentence may in its discretion, allow him time for the payment of the fine or direct payment of the fine to be made by instalments.

In India, Section 70 of the Indian Penal Code prescribes time limit within which fine is leviable. Under this provision the fine, or any part thereof which remains unpaid may be levied within six years after the passing of sentence[95].

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[94] See Section 283(1)(b)(3) of the Malaysian Criminal Procedure Code, which reads: "The Court passing sentence of fine may issue a warrant for the levy of the amount by distress and sale of property belonging to the offender."

[95] Similar provision exists under Section 283(1)(g) of the Malaysian Criminal Procedure Code.

Section 424(1)(a) of the Indian Code of Criminal Procedure also empowers the Court to suspend execution of sentence of imprisonment in default of payment of fine. If the fine is not paid forthwith, the Court may order that the fine shall be payable either in full within thirty days from the date of the order, or in two or three installments.

It is submitted that these statutory provisions if extensively used in deserving cases may protect a large number of short-termers from the harmful effects of prisons in those cases where they are unable to pay fine.

A number of distinguished authors of criminal law have supported the idea of payment of fine or instalment basis. M.J.Sethna in support of fine by instalment says that persons who are genuinely unable to pay fine should not be allowed sufficient time for the payment of fine, say by instalment, if necessary[96].

Similarly, H.A.Palmer and Palmer Henry advocate the idea of payment of fine by instalment. They contend that in additions to giving time for payment, the Court may direct payment by instalment and where such an order has been made on the application of the defendant, the Court should allow some more time for the payment, being satisfied that due to circumstances beyond his control the defendant, was or will be unable to pay within the time allowed and has a reasonable chance to pay if further extension is allowed[97].

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[96] Jehangir M.J.Sethna, *Society and Criminal*, Bombay, N.M.Tripathi (1971) p. 298.
[97] Palmer and Palmer, *Criminal Law* pp. 449-467.

4.7.6 Fine as a substitute for short-term imprisonment

The fine has always been regarded as one of the important substitutes for short-term imprisonment. But not much progress has been made in this direction in Malaysia and India, as it is clear from the number of persons sent to prisons to serve short-term imprisonment[98]. However, substantial progress has been made in English law in this direction.

Since the Criminal Justice Administration Act 1914 was enacted, the Courts have been urged to make wider use of fine. It was made easy for the default of payment. Later they were also allowed to pay fine by instalment. The Magistrates were also required to allow sufficient time for the payment of fine. Initially the Magistrate at the time of passing sentence used to decide the imposition of fine and the period of imprisonment in case the offender was unable to pay fine. Subsequently Money Payments (Justice Procedure) Act 1935 provided that the Magistrate could not do so unless he had special reasons such as seriousness of the offence. This made it possible for the defaulters not to be sent to prison without being reheard in the Court and without an enquiry being conducted about his ability to pay[99].

In United Kingdom, the Magistrates are empowered to place an offender under supervision[100] until fine has been paid. If the offender is under twenty one years it is obligatory on the Magistrate to place him under supervision till the recovery of the fine unless it is otherwise not in the interest of the offender.

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[98] See Chapter Three.

[99] Manneheim H. "Group Problems in Crime and Punishment", *Criminal Law and Criminology* London Rantledge and Kegan Paul Ltd; (1955) p.246.

[100] See Section 71 of the Magistrate Act 1952.

Invocation of fine by the Courts has increased as it is clear from the statistics[101]. The fine, if recovered from the offender goes into the state exchequer. But the Supreme Court of India in recent years has recognised the concept of victimology in the application of fine and directed that fine if recovered should be paid to the victims of crime. In *Mohindra Pal Singh v. State of Punjab*[102], the appellant was convicted by the Additional Session Judge for causing death under Section 304 Part I of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and a fine of Rs10000 in default to two years rigorous imprisonment. The fine, if recovered, was directed to be paid to the dependants of the deceased in equal shares. Against his conviction, the appellant appealed to the High Court and pleaded right of private defence. The State also filed an appeal and the widow of the deceased filed revision in the High Court for convicting the appellant under Section 302 of the Penal Code instead of Section 304 Part I of the Penal Code. The High Court dismissed both the appeals and the revision application. The appellant appealed to the Supreme Court.

The Supreme Court reduced his substantive term of imprisonment to the period already undergone as the appellant had passed along ordeal all these years both mentally and financially. However, the imposition of fine and direction to distribute the fine to the dependants of victim was maintained.

Similarly in *Bhapendra Singh & Others v. State*[103], the appellants acquitted on the charge under Section 307 read with Section 149 of the Indian Penal Code, were however convicted by the additional session judge for having committed an offence under Section 324 of the Indian Penal Code read with Section 149 of the Indian Penal

[101] supra note 75.
[102] A.I.R. 1979 S.C. 577.
[103] A.I.R. 1981 S.C. 1240.

Code. On the question of sentence, the learned judge observed that since accused persons belonged to age group of 19-20 years and at the time of committing the offence they were studying in a college. This was a fit case in which benefit of the provisions of Probation of Offenders Acts should be given to the accused with the condition that the accused persons should pay Rs.250 to injured P.W.4 and Rs.200 to P.W.1 by way of compensation.

The State appealed to the High Court against the order of acquittal for the offence under Section 307 read with Section 149 of the Penal Code. The High Court allowed the appeal and convicted the accused for an offence under Section 307 of the Penal Code and sentenced to one-year rigorous imprisonment and to pay fine. A further direction was given that if fine released, it is to be paid to the injured person.

On appeal, the Supreme Court allowed the appeal and set aside the conviction and sentence of the appellants but gave the direction that out of fine paid by the appellants after deducting the amount already paid to the injured, the balance may be paid over to the injured to be equally divided between them.

The new trend set by the Supreme Court of India has encouraged the Courts to apply the fines recovered from the offenders to the victims of crime or their dependants. This direction of the apex Court may encourage the Court to impose fine instead of sending the offenders to prisons as consequently it will also be helpful in solving the problem of short-termers.

4.8 COMMUNITY BASED SANCTIONS

The expression "community based sanctions" refers to the number of modern non-custodial sentencing measures, which imposes a restriction on personal liberty of source, kind of the offender. These measures include, community service orders, attendance centre orders and other community-based measures. Each of these is discussed in this part of the chapter with a view to assessing the viability of these measures as an alternative to short-term imprisonment under Indian and Malaysian Systems.

4.8.1 Community Service Order

Community service order has emerged in recent times as one of the important alternatives to short-term imprisonment, Courts, correctional workers, community organisations and even some offenders support community service as a penalty[104] for the following reasons:

1) because it is considered to be less costly[105],
2) more effective and humane than imprisonment. It also protects and promotes offenders' self esteem and sense of worth. In addition, it is also a source of service to the community. It keeps away the offender from the contact of prison populations.

When proposing community service orders the Advisory council on the penal system said:

> To some, it would be simply a more constructive and cheaper alternative to short sentences of imprisonment, by others it would be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community; others again would regard it as a means of

[104] Law Reform Commission Report 44, Canberra Australian Govt. Publishing Service (1988) p.62.
[105] In one of the studies in United Kingdom, it was found that the average cost in 1989 of maintaining a prisoner at prison was £288 per week, community service at £15 per week and probation orders at £19 per week. See Tim May, *"Probation and Community Sanctions"* in the Oxford Handbook of Criminology ed. Maguin and Morgan Oxford Clarendon Press (1994) p.877.

giving effect to the old adage that the punishment should fit the crime; while still others would stress the value of bringing offenders into close touch with those members of the community who are most in need of help and support.

A Court order which deprived an offender of his leisure and required him to undertake tasks for the community would necessarily be felt to have a punitive element. What attracts us, however, is the opportunity which it could give for constructive activity in the form of personal service to the community, and the possibility of a changed outlook on the part of the offender. We would hope that the offenders required to perform community service would come to see it in this light, and not as wholly negative and punitive[105A].

Community service orders are sentencing dispositions under which the Court directs the offender to render community work either in his leisure hours or on days or hours specified by the Court offenders usually pick up trash in public parks, clean roads, provide manual labour. In the beginning, the sentence was used primarily to permit offenders who could not pay fine to work off their obligations by working for the community. It was usually in addition to the probation, rather than a sentence in itself[106]. But now community service is regarded as a sentencing option. The offenders who participate in this programme provide a significant saving to the custodial sentence.

In Malaysia and India, no statutory law exists governing the rules of community services. However, in the United Kingdom community service order (CSO) was introduced in the Criminal Justice Act 1972. Initially community service order was applied in some selected probation areas representing different parts of the country. The results were very encouraging and the application of the CSO was

[105A] Non-Custodial and Semi-Custodial Penalties-Report of the Advisory Council on the Penal System, London, Her Majesty's Stationary office (1970) p.13.

[106] Gilbert Lewis Ingram, "Offender's Accountability and the United States with Custodial and Non-custodial Measures", *Resource Material 38* Tokyo UNFAEI (1990) p.210.

extended to all the probation areas in England, Wales and Scotland. The present law of Community Service Order is contained in the Powers of Criminal Courts Act 1973. The pre-condition for the making of a community service order as follows:

1) A community service order may be made against an offender who has attained the age of sixteen[107]. Offenders of all ages and both sexes are eligible for the CSO but majority belongs to the younger group.
2) The offence for which CSO is granted must be punishable with imprisonment. This is due to the fact that the object of CSO is to provide an alternative to prison. Before making an order for community service, the Court must be satisfied that the offender is a fit person for such an order and the arrangement exists for him to perform unpaid work under the direction of a probation officer[108], for a specified number of hours. The minimum number of hours for community service order is forty hours and maximum is two hundred and forty hours[109] and these should be performed within twelve months[110].
3) A social enquiry report is pre-requisite to community service order. This is because after considering the report the Court needs to be satisfied that the offender is a suitable person for a community service order[111]. The normal practices refer to the case of an offender for assessment by the probation officers responsible for the community service scheme in the area concerned.
4) The consent of the offender is necessary to making such an order. This is similar to the condition of any probation order. An offender's consent to probation order

[107] Section 14(1) of the Power of Criminal Courts Act 1973, originally the minimum age was 17 but the Criminal Justice Act 1982 reduced this age to 16.
[108] Ibid Section 14(4). Any person other than a probation officer may be assigned to supervise the work.
[109] Ibid Section 14(3).
[110] Ibid Section 15.
[111] Ibid Section 14(2)

has always been required because a probation order is considered to be ineffective in the case of a totally uncooperative offender and it might be ethically objectionable to impose an alternative to a sentence upon an offender without his consent[112].

5) Before making a community service order, the Court must explain to the offender in ordinary language the purpose, and consequences of the failure to comply with the effect of the order, and supply him with a copy of the order[113]. The copies should also be supplied to the supervising office or probation officer.

4.8.2 Amendment of the Order

The community service order may be amended, extended or revoked on the application of the offender or probation officer to the Magistrate. The Magistrate may extend the period of twelve months if it appears that it would be in the interval of justice to do so having regard to the circumstances, which have arisen since CSO, was made[114]. If the order is revoked, the Court may deal with the offender for the original offence as if the order was not passed by the Court[115].

4.8.3 Failure to comply with the requirement of a Community Service Order

The breach of community service orders is like probation finable. When an offender subject to such order fails to comply with the requirement with the order, he may be

brought before the Court, if the Court is satisfied that the offender has failed to comply with the requirement of CSO, the Court may impose fine up to £400 and allow the order to continue or revoke the order and deal the offender for the offence in

[112] Warren Young, *Community Service Orders*, London, Heinemann (1979) p.27.
[113] supra note 107 Section 14(5).
[114] Ibid Section 17(1)
[115] Ibid Section 17(3)

respect of which the order was made in any manner in which he could have dealt as if the order had not been made[116].

4.8.4 Administration and use of Community Service Order

Community service order requires the unpaid work to be done by the offender for the community under supervision of either people of the public or voluntary organisations. The administration of the community service order is run by the probation service. The nature of the work undertaken by the offender varies considerably. However, an attempt should be made to promote consistency and tom ensure that such an order operates as genuine restriction on the liberty of the offender under CSO and is not treated as let off by him, nor distrusted by the sentencer.

The Courts have provided some guidance to the sentencers on the use of community service orders and have encouraged its use in cases, which might have been disposed off by imprisonment. In *R.v. Lawrence*[117], the appellant aged 23 years was convicted for burglary from commercial premises, where the appellant took television and video equipment. He was sentenced to 18 months imprisonment. He had some previous conviction but had not been in trouble with the police for some time. The Court of Appeal found that the appellant showed signs of settling down and remaining a useful member of society and reduced the prison term to 150 hours of community service. On the subject of how many hours should be ordered, Lord Lave said:

> "Generally speaking it was wrong to order a small number of community service hours where alternative order would have been, as in the present case, a sentence of imprisonment. A short period of community service would usually be reserved for cases in which the Court was not

[116] Ibid Section 16(8).
[117] (1982) Crim. L.R. 126.

minded otherwise to impose a custodial sentence. In the present case, the Court would probably have ordered about 190 hours service if the appellant had not spent a little time in prison before being re-based on bail, as it was, 150 hours would suffice."

Similarly *R.V.Canfield*[118], the appellant aged 32 pleaded guilty to burglary and he was sentenced to 9 months imprisonment. During 1967 and 1976 he had committed numerous burglaries resulting in separate imprisonment, varying in length between 1 year and 3 years. On his last release in 1977 from prison, he married and obtained regular employment and became the father of two children. He changed his life and kept out of trouble. Later he lost his job due to some minor road traffic offences. The present robbery was committed when he was depressed due to being unemployed and financial pressures due to fines imposed for the said traffic offences.

In his efforts to lead an honest life since 1977 and the circumstances, which contributed, to the present involvement of the offence, the Court of appeal replaced the prison sentence to 80 hours community service.

The Court of Appeal's decisions show that there is distinct tendency to approve community service order for young offenders involved even in burglary offences, whose offences are not very serious and previous record of the offender is favourable. The community service orders have also been upheld in the cases of moderate violence, where mitigating factors are present[119].

[118] (1982) 4 Cr. App.R 94.
[119] Andrew Ashworth, *Sentencing and Criminal Justice*, London, Weidenfeild and Nicolson (1992) p.270.

The above judicial approach is reflected in an increase in the use of community service order in England. The figures for England and Wales show that the number of supervision offenders on CSO rose from 15,700 in 1979 to 37,200 in 1985. Over 9% of the orders were for indictable (i.e. more serious) offences[120]. In 1993, the number of offenders who were placed on CSO rose to 48,000 this figure represented a 9% increase in 1992 and a 40% increase in 1983. The recent trends show greater use of CSOs for offenders over the age of 21 who now makeup 72% of the total[121].

To evaluate the effectiveness of community service order, the Research Unit of Home office conducted research and published two reports. The first research report examined the working of six community service order experimental schemes and concluded that the schemes were working well and that the CSO could be regarded as successful judged by the proportion of CSOs successfully completed. Similarly the Inner London Probation Service found that 70-75% of CSOs were successfully completed[122].

The second research report tried to estimate to the proportion of those given community service who were diverted from custody i.e. where the order replaced a prison sentence. They found that the proportion was within the range of 40-50% of those given community service orders. They also found that 44.2% of all those sentenced to community service were reconnected within a year of sentence[123].

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[120] John Eryl Hall Williams, *New Kinds of Non-Custodial Measures-The British Experience*, Resource Material 32 Tokyo UNAFEI (1987) p.127.
[121] Nigel Walker and Nicola Padfield, Sentencing, Theory, Law and Practice, London, Butterworth (1996) p.264.
[122] Supra note 122 at p.126.
[123] Ibid

The community service order is the plainest example of punishment in the community and might therefore be expected to easily replace custodial sentences. The Court of Appeal's (English) decision shows a distinct tendency to approve community service orders for young offenders whose offences are not serious and whose previous record is favourable. The Courts have also awarded community service orders in cases of moderate violence where some mitigating factors are found[124].

The results of researchers conducted to evaluate the efficacy of CSO also show that there is great potential in the form of non-custodial penalty unpaid community work for offenders would be useful and meaningful and enhance the skills of the offenders. It would maximise contact between offenders and members of the public.

4.9 ATTENDANCE CENTRES

An attendance centre is another community based penal measure, which is used as an alternative to short term imprisonment. It is a place at which youthful offenders may be required to be present at a specified place for a certain number of hours and be given under supervision appropriate occupations or instructions.

In Malaysia the legislation exists to establish attendance centres under Compulsory Attendance Ordinance 1954. Unfortunately, these centres are no more in existence in Malaysia.

[124] Supra note 121 p.270.

In England, though, attendance centres are working well[125]. Here an attempt has been made to look viability of establishing attendance centres in India and Malaysia as an alternative to short-term imprisonment.

In England under Criminal Justice Act, 1982, provision has been made for the imposition of non-custodial penalty by deprivation of leisure in respect of offenders under 21. They are required to spend between 6 and 12 two hours sessions on separate Saturday. Thus, the offender is punished by having his normal Saturday activities interfered with[126]. The total time to be spent at the Attendance Centre is usually 12 hours and it should not exceed 24 hours. They spend one hour in physical exercise and another hour in instruction in handicraft.

These centres form a bridge between custodial treatment and non-custodial treatment and satisfy the modern concept of punishment and training of youthful offenders without removing them from their homes. In 1992 there were 66 junior attendance centres for males under 17 and 18 junior mixed attendance centres for males and females under 17. There were also 26 senior centres for males under 17-20 years. In Malaysia two such centres were established in Kuala Lumpur and Penang. The first offenders of minor offences under sentences of not more than three months imprisonment were committed to the attendance centres for not more than three hours daily after their usual working hours. They were required to report daily five days a week from 5 p.m. to 8 p.m[127].

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[125] Harding and Koffiman, *Sentencing and the Penal System: Text and Materials*, London Sweet and Maxwell (1995) p.377.
[126] Christopher J.Ermmins, *A Practical Approach to Sentencing*, London, Blackstone Press Ltd (1985) p.239.
[127] Hj. Shardin bin Chik Lah, "*Practical Measures to alleviate the Problem of Overcrowding*" Resource Material No. 36, UNAFEI (1989) p.237.

The centres worked for few years, but they soon disappeared as the Courts in Kuala Lumpur and Penang rarely applied the Compulsory Attendance Ordinance 1954. Before making attendance centre order, the Court must be satisfied that an attendance centre is available in the area of appropriate sex and age group concerned and the centre that it proposes is accessible to him[128]. The order must specify the centre and the date and time of the first attendance. Thereafter he has to attend in accordance with the direction officer in charge[129] of the centre who as far as possible will fix attendance to avoid interference with school schedule or working hours of the offender. The offender is not required to attend the centre more than three hours at one time and no more than one attendance per day[130].

The programme of attendance centres are run in the school premises, youthful clubs, Church halls and other suitable places by off duty police officers. In some centres run by police, civilians from various institutes are also engaged to help them. When there is failure to attend or breach of the rules of the centre, the offender may be brought back to the appropriate Court. This Court may revoke the order and deal with the offender for the original offence in anyway the Court which made the order could have dealt with him. The Criminal statistics for the year 1983 showed that 21% of the juveniles (10-14) years sentenced for indictable offences received attendance centre order and17% of those aged 14-17 years received the order[131].

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[128] Supra note 128 at p.239.
[129] See Section 17(1) and (9) of the Criminal Justice Act 1982.
[130] Stockdale & Devlin, *Sentencing*, London, Waterlow Publishers (1987) p.173.
[131] Supra note 125.

The experience of attendance centre order shows that these orders have been successful in the cases of first offenders and those with a normal family background. As discussed earlier, in Malaysia, attendance centres were created under Compulsory Attendance Ordinance 1954. This was considered useful in certain categories of offenders convicted for less serious offences. The centres worked for a couple of years and disappeared as the Courts in Kuala Lumpur and Penang where they were established rarely applied the Compulsory Attendance Ordinance 1954.

It is submitted that in Malaysia attendance centres be established under the Ordinance 1954 so that the Courts may have the option of using them in the cases of those offenders who have committed minor offences. In India no legislation exists as the attendance centre. In India suitable provisions may be made on the lines of English Criminal Justice Act 1982 to give judicial sanction to this mode of punishment.

4.10 CONCLUSION

Some of the important problems and constraints which we have addressed in this chapter in order to replace custodial measures to non-custodial measures include deficiency or requirement of appropriate legislation, negative attitude of community, lack of financial resources and inadequacy of research on the rehabilitative effects of non-custodial measures.

In order to achieve the desired effects of non-custodial measures as an alternative to short term imprisonment, the following suggestions are offered.

The Courts in Malaysia and India are empowered to release offenders on absolute and conditional discharge. It is submitted that in deserving cases, this benevolent provision should be used more liberally. It should be noted that unlike the Malaysian provision (Sections 173 A and 294 of the C.P.C.) the Indian provision (Sections 360 and 361 of the Cr.P.C.) dealing with absolute and conditional discharge are mandatory in nature. If the Court fails to release the offender it shall record special reasons for not doing so. The special reasons to be recorded should be such as to compel the Court to hold after examining the age, character and antecedents of the offender that it is impossible to deal with the offender by any other non-custodial measure. Furthermore, the omission to record special reason is an irregularity and on revision or appeal the sentence passed by the lower Court may be set aside if the irregularity has caused any miscarriage of justice. Thus, in India these statutory provisions have to a certain extent helped the Court to contain prison population to a certain optimum level so as to protect the short termers from the contaminated atmosphere of prison life. It is submitted that in Malaysia such a provision if made mandatory for the Courts to release the offender will protect many first offenders from the ill effects of prison life.

The experience of the countries where probation system has been effectively used[132], as it has helped many offenders to change themselves and rehabilitate in the

[132] In India during 1964-68, 33094 offenders were placed on probation under the Probation of Offenders Act and other similar state legislation. These figures showed that 90% of the offenders completed their probation period without further committing offence. See Siddique Ahmed, *Criminology*, New Delhi Eastern Book Company Ltd. p.113.
In a recent study it has been found that the rate of success of adult probationers in India on an average was 58.9% which is quite satisfactory. See Raina Subash C. Probation, *Philosophy, Law and Practice*, New Delhi Regency publications (1996) p.169.
It is also to be noted that in Malaysia, more youthful offenders than juveniles successfully completed their probation period. See tables 4.1-4.4.
In Singapore, the experience of probation is also very encouraging. In 1961 probation was ordered for 183 juveniles and 159 adults out of a total of 321 juveniles and 253 adult cases investigated by

society as a good citizen. A few suggestions are offered to make probation effective in Malaysia and India.

The Malaysian Criminal Procedure may be suitable amended in line with the Indian Criminal Procedure Court to grant probation to adult offenders. This will reduce the pressure on the prison and save the short termers from the ill effects of jail life.

In order to reduce the risk to the society attendant upon the inadvertent release on probation of undeserving offenders, the Courts should insist upon receiving full information in the nature of pre-sentence report[133] provided under the Indian Laws dealing with probation. In Malaysia this can be done with the help of social welfare department[134]. The probation officers working under the social welfare department may be of assistance to the Courts to furnish such pre-sentence reports. In India this is being done by the probation officers working under the probation department[135]. It is therefore submitted that provision should be made in law making pre-sentence enquiries essential in Malaysia.

The judiciary, the Bar and Prosecution, all should become votaries of probation systems.

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probation officers. The majority of them completed their probation period without committing a fresh offence. See V.Kumar *Probation of offenders* [1963] MLJ lxxiv.

[133] Section 235(2) of Indian Code of Criminal Procedure 1973 provides that the Court shall hear the accused on the question of sentence before passing sentence. The object of this provision is to acquaint the Court with the social personal data of the offender and thereby enable the Court to decide as to the proper sentence or any other method of dealing with the offender after his conviction.

[134] In Malaysia more than 300 probation officers are working under the Ministry of Social Welfare.

[135] M.Zakaria Siddiqi, *"Role of Probation Officer in the Prevention of Crime"*. Social Defence, Vol. ix No. 36 April 1974.

As we have observed earlier, that the problem of overcrowding in jails due to the unnecessary presence of short-termers in Malaysia and India has assumed alarming portion and has been fettering the progress of modern correctional techniques, which emphasise on individualised treatment of offenders. This problem can be solved by implementing the probation programs in Malaysia and India.

In India the Courts very often release an offender on probation without supervision by a probation officer. This practice is against the very ideal of probation system. A Probationer needs assistance and guidance during his probation period. In the absence of proper and effective supervision there is likelihood of his relapsing into the life of crime. It is desirable hat the Court before making probation order should satisfy itself that there is a probation officer to look after the person granted probation.

It is further submitted that the Court should be empowered to reduce the period of probation if the probationer behaves well and to increase the probation period if the circumstances of the case warrant.

Fine can also play a significant role as an alternative to short term imprisonment. The Courts should make wider use of it as a penalty. It should be assessed according to the means of the offender. In cases of default payment of fine or inability to pay, the offender should not be sent to prison instead he might be permitted to pay by instalment. It should be made obligatory on the Courts to give sufficient time to the offender to pay fine. The Court should take into consideration not only the financial circumstances of the offender, but also the profit arising out of the offence and the value of the subject matter and the injury caused by the act of the accused. The Community Service Order (CSO) penalises the offender by deprivation

of his leisure time and also gives him an opportunity to make reparation to the community. A CSO is made in default of a payment of fine or in view of imposing a sentence of imprisonment for an offence which is punishable by imprisonment considering the non-necessity of it in view of the offenders character, the nature of the crime and other circumstances.

In Malaysia and India no legislation exists for Community Service Order, however, the legal departments of both the countries are contemplating of making provisions for such orders[136].

The Community Service Orders have worked with success in the United Kingdom. Looking at the experience of the U.K. community service orders can work well in Malaysia and India and may be used as an alternative to short term imprisonment.

Attendance Centres also provide an alternative to short term imprisonment in the cases of petty offenders who may otherwise be sent to prison. The great advantage of this penalty is that it serves as a bridge between custodial and non-custodial treatment and satisfies the modern concept of punishment and training of offenders without disturbing their family life. No statute exists in India for the establishment of these centres. However, in Malaysia two such centres were established under Compulsory Attendance Ordinance 1954. The first offenders of minor offences under

[136] The law Minister of India while visiting Malaysia on 3 September 1997 had told the gathering of some Indian Professors of Law in Kuala Lumpur that the Government of India is considering to introduce community service as a penalty.
It was also stated by the law Minster of Malaysia Datuk Syed Hamid Alber that the cabinet agreed to accept his Ministry's recommendations to implement the alternatives to sentencing which include parole systems, suspended sentence, plea of bargaining and community services etc. See New Straits Times (9 October 1992.

the sentences of not more that three months of imprisonment were committed to these centres for not more than three hours daily after their usual working hours. These centres were in operation for a few years, later they disappeared as the Courts in Kuala Lumpur and Penang where they were established rarely applied the Compulsory Attendance Ordinance 1954. These centres are in use in United Kingdom and working well. It is submitted that in India the provisions should be made for the establishment of attendance centres and in Malaysia since Compulsory Attendance Ordinance 1954 has not been repealed, it can be revived and used in the cases of short-term prisoners.

CHAPTER FIVE

FACTORS AFFECTING SHORT-TERM IMPRISONMENT

5.1 INTRODUCTION

In the previous chapter the use of non-custodial measures as a substitute for short-term imprisonment was discussed. The present chapter is an extension of the earlier discussions, with focus on the sentencing policies and practices of the courts both in India and Malaysia. In fact it is the domain of the court to decide in what type of cases and under what circumstances they should impose a short-term imprisonment or avoid it by using non-custodial measures. A study of the decisions of the courts discloses that avoidance of short-term imprisonment is not an explicit policy of the sentencing courts. However, the courts do take into consideration aggravating and mitigating factors, which determine the amount of penalty imposed on the offender. This chapter is therefore devoted to the consideration of mitigating factors, which affect the short-term imprisonment.

According to D.A.Thomas, the term mitigating factor is used to refer to such matters as the character and history of the offender, the pressures which led to the commission of the offence and the consequences of the conviction and sentence for him[1].

[1] D.A.Thomas, *Principles of Sentencing*, London Heinemann (1982) p.194.

Some of the important mitigating factors discussed in this chapter will include

(a) age of the offender

(b) his record

(c) good character

(d) circumstances resulting in the commission of the offence

(e) plea of guilty

(f) health of the prisoner

(g) effect of sentence on family

(h) behaviour subsequent to the commission of the offence

These mitigating factors may influence the sentencer to decide appropriate sentence in cases punishable with short-term imprisonment. In some cases the offence is so serious that mitigation can only have a marginal effect, while in other cases mitigating factors are ignored for public policy reasons.

The allowance for mitigation is not regarded as an entitlement of the offender. The court may not consider the mitigating factor if some recognised penal objective such as general deterrence or preventive confinement of the dangerous offender requires imposition of full permissible sentence[2].

Mitigation may affect sentence in different ways. It may reduce the quantum of punishment as when the offender may be sent to prison for a short-term or fined for a smaller sum of money. Sometimes mitigation may persuade the court to impose a different form of punishment, for example a non-custodial penalty rather than a custodial penalty. And sometimes mitigation may lead the court to completely[3]

[2] Ibid.
[3] Ibid.

abandon the idea of punishment and make an order for conditional discharge, probation, supervision order and other community based sanctions. When the court makes any order in lieu of imprisonment its primary aim is to help the offender to overcome those problems which led him to criminality. In India no specific statutory provision exists requiring the courts to consider mitigating factors. However, Section 360 of the Indian Criminal Procedure Code[4] and Section 3 & 4 of the Probation of Offenders Act 1958[5] mention sources of mitigating factors such as age, character or antecedents of the offender and the circumstances of the commission of the offence, which the court may consider when releasing the offender after admonition and on probation of good conduct.

In Malaysia the plea in mitigation is considered by the trial court where it appears that there is ground for such a plea. When the plea in mitigation is made, it is to be incorporated by the court in the record of judgement. Section 176(2)(r) provides that the particulars to be incorporated in the record shall include the courts' note on previous convictions, evidence of character and plea in mitigation. In Malaysia Section 173A and Section 294 of the Criminal Procedure Code[6] and ss. 12 and 13 of the Juvenile Court Act 1947[7] are the sources of the mitigating factors. The discussion

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[4] see chapter 4

[5] Section 3 of the Probation of Offenders Act 1958 (India) provides that when any person is found guilty of having committed an offence punishable with imprisonment for not more than two years, or with fine under the Indian Penal Code or any other law, and no previous conviction is proved against him, and the court trying the case is of opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond with or without sureties.

[6] Section 173 and 194 of the C.P.C state mitigating factors such as antecedents, character, health, mental condition extenuating circumstances of the offence, trivial nature of the offence and expediency to treat the offender leniently.

[7] ss. 12 and 13 of the Juvenile Court Act provides special procedure for the trial, conviction and sentence in the cases of juvenile offenders. In this procedure the status of being juvenile offender is considered a mitigating factor.

that follows now relates to the consideration of these mitigating factors. It is intended to demonstrate how these practices have helped or aggravated the problem of short-term prisoners.

5.2 AGE OF THE OFFENDER

Age of the offender is a highly relevant factor in the sentencing policy particularly in the case of young age where there is greater need to save the youth from the deleterious effects of jail life. Exposure to jail even for a short term may harm his personality beyond redemption. Age again becomes relevant if the offender is very old. The court may consider old age as a mitigating factor if it believes that the offender may not survive his prison sentence. But not all offenders of the same age group are treated alike, for example, where the offender is very old but is convicted of a very serious offence.

The issue of young age of the offender came up for consideration before the court in *Tukiran Bin Taib v. Public Prosecutor*[8], where the accused aged 17 or 18 years was convicted by the Magistrate Court for stealing 167 coconuts under Section 379 of the Penal Code. He was sentenced to four months' imprisonment. On revision of the case the learned judge questioned the sentence of imprisonment and held that it is very desirable that the young first offender who is between the age of 17 and 21 should be kept out of prison, if possible, as it would be more beneficial to him, and in the long run to the community at large to send him to an advanced approved school.

[8] (1955) 21 M.L.J 24

The same approach was adopted by Tan Chiaw Ting approving Turkiran in *Teo Siew Peng v. Public Prosecutor*[9] observed:

> In the case of a young offender there can hardly ever be any conflict between public interest and that of the offender. The public has no greater interest than that she should become a good citizen. The difficult task of the court is to determine what treatment gives the best chance of realising that object.

In *Re Johari Bin Ramli*[10] the court was more specific in condemning a short-term imprisonment where a youthful offender was involved. In this case, the accused aged 22 years was convicted on a charge of possession of house breaking implements under Section 28(i)(ii) of the Minor Offenders Ordinance 1955 and he had a number of previous convictions. The learned Magistrate sentenced the accused to 10 days imprisonment. On revision the learned judge called for a probation officer's report and after considering the report set aside the sentence and substituted an order of binding over. Spenser Wilkinson J. observed:

> "I would like to take this opportunity of pointing out to Magistrates the great importance of a careful selection of sentence in regard to young men of this type who having criminal record going back to an early age can still be looked upon, although over age as juvenile delinquents. There are often circumstances in which short terms of imprisonment have to be imposed but it should be borne in mind that a series of short-term imprisonment have very little effect in reforming wrong-doers and often has a tendency to convert them into habitual criminals."

On the other hand, in *Public Prosecutor v. Mohamed Ali Bin Kipli*[11]; the court failed to consider youth as a mitigating factor. In this case the accused, a student, attacked a teacher at the college when the teacher confiscated the boys' video game set and had used some mildly provocative words which seemed to have incised the

[9] (1985), 2 M.L.J 125
[10] (1956), 22 M.L.J 56
[11] (1986) 1 M.L.J 444

accused. The accused was convicted of both causing hurt and grievous hurt and sentenced to three months imprisonment. On appeal against sentence the High Court enhanced the sentence to nine months imprisonment observing that the conduct of the accused could not be tolerated.

Age is not considered a mitigating factor when the offence committed by the accused is heinous and the court believes that the deterrent aim of punishment should be given priority. In *Tan Bok Yeng v. Public Prosecutor*[12], the accused were jointly charged in the sessions court for robbery under Section 392 of the Penal Code read with Section 34 thereof. The second accused pleaded guilty to the charge and was bound over under Section 294 of the Criminal Procedure Code. The first accused (appellant) claimed trial and after being found guilty was sentenced to one year's imprisonment. He appealed against sentence. The second accused was 20 years of age while the appellant was 25 years at the date. As to age and youth Sharma J. observed:

> "I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has however, emerged in recent years in our society certain species of crime which the alacrity of mind and body, the dare, dash and defiance of youth alone is capable of performing and producing the law cannot, in my view, remain merely a static and meaningless passive, journamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be refrained from becoming a menace to the society[13]."

[12] (1972) 1 M.L.J 214
[13] Id. 215

Similar views can also be noted in the Indian case of *Daulatram v. State of Haryana*[14], where the appellants (Netram and Daulatram) were both convicted under Section 325 read with section 34 and section 323/34 and sentenced to rigorous imprisonment for two years and three months respectively. On appeal to the High Court the conviction of both of them was upheld but the sentence under Section 325/34 was reduced. The court refused to grant special leave to one of the appellants (Netram) however the other appellant (Daulatram) was granted special leave limited only to the extent of the applicability of the Probation of Offenders Act. This is how the case came before the Supreme Court of India. The appellant on the date of conviction was less than 21 years. Therefore, the Supreme Court pointed out that it was incumbent on the trial court to consider whether the provisions of Section 3 and 4 of the Probation of Offenders Act could be applicable. The Supreme Court stated that under S.6 the court has to make a selection between the two alternatives, whether to sentence the offender to imprisonment or to apply to him the provisions of the Offenders Act. The Supreme Court stated:

> "Now the object of S.6 of the Act broadly speaking is to see that no offenders are sent to jail for the commission of less serious offences mentioned therein because of grave risk to their attitude to life to which they are likely to be exposed as a result of their close association with hardened criminals who may happen to be their inmates in jail. Their stay in jail in such circumstances might well attract them towards a life of crime instead of reforming them. This would clearly do them more harm than good and for that reason it would perhaps also be to an extent prejudicial to the larger interest of the society as a whole. It is for this reason that a mandatory injunction against imposition of sentence of imprisonment has been omitted in S.6. This mandate is inspired by the desire to keep the young delinquent away from the possibility to association or close contact with hardened criminals and their evil influence. This section, therefore deserves to be liberally construed so that its operation may be effective and

[14] A.I.R. 1972 S.C. 2434

beneficial to the young offenders who are prone to be more easily led astray by the influence of bad company."

The Supreme Court further held that in view of the matter, the nature and attendant circumstances of the offence on hand and age of the appellant Daulatram it was proper to give him the benefit of the Act.

In the Indian case of *Devassia Joseph v. State of Kerala*[15], the petitioner along with three others was charged for an offence under Section 394 of the Indian Penal Code read with Section 34. The Judicial Magistrate found all the accused guilty and sentenced them to undergo rigorous imprisonment for two years. The accused challenged the judgement of the Magistrate in appeals filed before the Sessions Court. The Court of Sessions dismissed the appeal holding that the findings of the learned Magistrate were correct. This judgement of the Sessions Court was challenged by the second accused in the Criminal revisions before the High Court. In the revision petitions it was contended that petitioner was innocent. It was then contended that if petitioner can at all be found guilty, they can only be found guilty of theft so this was a fit case where the accused will be given the benefit of Section 360 of the Code of Criminal Procedure 1973. It was held that at the time of committing the offence the accused petitioner was only 19 years and he was not a previous convict. This was a fit case for invoking Section 360 (i) of the Cr.P.C and releasing the accused petitioner on probation of good conduct.

[15] 1982 Cri.L.J 714

In the Indian case of *Abdul Qayum v. State of Bihar*[16], the appellant aged of about 18 years was convicted under Section 379 of the Indian Penal Code and sentenced to six months rigorous imprisonment. Before the sentence was passed on him it was prayed he should be released on probation under Section 6 of the Probation of Offenders Act, 1958 as he was a young offender. His appeal against conviction and sentence was dismissed and also his prayer for being given benefit under the Probation of Offenders Act was also rejected. Thereafter, a revision petition was filed by the accused before the High Court, where the only point urged on behalf of the appellant was that he should be given the benefit under the Probation of Offenders Act. The High Court dismissed the revision petition.

On appeal the Supreme Court set aside the sentence and stated:

> "In our view neither the trial, the appellate court, nor the High Court applied their mind to the requirement of the provisions of the Act. As pointed out by the court in *Rattan Lal v. State of Punjab* A.I.R 1965 S.C. 444 'the Act is a mile stone in the progress of the modern liberal trend in the field of penology.' It is the result of the recognition of the doctrine that the object of the Criminal law is more to reform the individual offender than to punish him. The provisions of the Act must therefore be viewed in the light of this laudable reformatory object which the legislator was seeking to achieve by enacting the legislation. The Act differentiated offenders below 21 years who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of lesser offence. It is only in cases of offenders who are below the age of 21 years and guilty of lesser offences than those punishable with death and life imprisonment that an injunction is issued to the court not to sentence them to imprisonment unless it is specified that having regard to the circumstances of the case including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Section 3 or 4. It is also provided in sub Section (2) of Section 6 that the court shall for the purpose of satisfying itself whether it would give the

[16] A.I.R. 1972 S.C.214.

offender the benefit it referred to in sub section (1) call for and consider a report from a probation officer along with any other information available to it relating to the character, physical and mental condition of the offence..."

The court further observed,

"To sentence him to imprisonment would itself achieve the object of associating him with hardened criminals which association the courts thought was a good ground for denying him the benefit of being released on probation. We have no doubt that if he is released on probation on good conduct there is hope of his being reclaimed and afforded the opportunity to lead a normal life of a law abiding citizen"

It may be noted here that in the case of offenders under 21 years of age Section 6 of the Probation of Offenders Act makes it obligatory on the court to apply its mind judicially before imposing any term of imprisonment. It states that when any person under 21 years of age is found guilty of having committed an offence punishable with imprisonment, but not with imprisonment for life, the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that having regard to the circumstances of the vase including the nature of the offence it would not be desirable to deal with him under Section 3 or Section 4, if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so[17].

The above section of the Probation of Offenders Act is considered as laying down as one of the important mitigating factors in cases of youthful offenders. Recognition of age as a mitigating factor does not mean that imprisonment will not be imposed but rather it can be an important factor in cases of those offenders who have

[17] Section 361(b) of the Cr.P.C also places similar obligation on the courts in the cases of youthful offenders.

committed minor offences punishable with short-term imprisonment. The courts may in such cases instead of imposing any short-term prison sentence use any other non-custodial measure.

5.3 THE OFFENDER'S RECORD

The previous clear record of the offender is sometimes taken into consideration in avoiding a prison sentence. The appellate courts do not approve standardisation in sentences imposed on the offenders. A person who has earned a criminal record deserves a higher sentence. His criminal record will include records of all offences committed by him before the present trial. A juvenile does not possess any record, but information about the offences committed by him may appear on the surface when he attains adulthood[18].

In *Govindaraj v. Registrar of Criminals*[19], the accused was charged for an offence under Section 379 of the Penal Code at the Juvenile Court and was found guilty and bound over in the sum of $100 for one year under Section 12(1)(d) of the Juvenile Court Act 1947. The day the father of the accused executed the bond to exercise his finger prints, photographs were sent to the Registrar of Criminals. He applied to the court for an order of mandamus to direct the Registrar of Criminals to deliver the same to the applicant.

It was held that as the applicant could not be convicted in the Juvenile Court, the particulars of the applicant were not registrable under the Registration of

[18] Mimi Kamariah Majid, Criminal Procedure in Malaysia, Kuala Lumpur, Department of Publications, University of Malaya (1995) p.404.
[19] (1974) 1 M.L.J 112.

Criminals Ordinance 1948 and therefore the particulars should be returned to the applicant.

In *Abdul Karim v. Regina*[20], the appellant was sentenced to three months imprisonment on a charge of driving under the influence of drink contrary to section 27(1) of the Road Traffic Ordinance 1941. On appeal the learned judge observed that in considering whether a prison sentence should be imposed in the case of a first offender the facts of the case must be carefully considered and the gravity assessed according to the "yard stick" afforded by legislature. Any tendency to standardise punishment for any type of offence is to be deplored because it means an individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type. This tendency for imposing punishment for an offence for which the legislature has left a wide field of discretion to the court has to be resisted. For the offence for which, the appellants were convicted the legislature has limited the court's discretion to a fine of $500 or 4 months imprisonment for a first offence. Therefore the court quashed the sentences of imprisonment and substituted with fine of $400.

Similarly in the *Tukiran Bin Talib v. Public Prosecutor*[21], the court after going through the record of the proceedings of the lower court so as to satisfy itself the propriety of the prison sentence imposed by the Magistrate, substituted the 4 months imprisonment with a committal to Henry Gurney School. In these cases the clean record of the offender prevailed over the courts to substitute sentence of imprisonment with other non-punitive measures.

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[20] (1954) 20 M.L.J 86.

[21] (1955) 21 M.L.J 24; also see *Shanmmuganathan v. Public Prosecutor* (1967) 1 M.L.J 204, where 4 months imprisonment was substituted with a bond for good behaviour.

In the Indian case of Phul Singh[22], where the accused was convicted for rape and sentenced to 4 years rigorous imprisonment, the Supreme Court of India looked into the record of the offender and found that the accused was in his early twenties and had no criminal antecedents and had shown signs of repentance. The families of the accused and victim were closely related and were also ready to take a lenient view of the situations. These factors were considered by the court in reducing the sentence of the offender.

The courts do not take in to account the clean record of the offender in mitigation of sentence where it considers that the punishment should be deterrent. In *Public Prosecutor v. Ng Ah Tak*[23], the accused was charged for acid throwing. The Magistrate imposed a fine of $400. The Public Prosecutor appealed against inadequacy of sentence. The learned judge setting aside the sentence of fine and substituting it with 3 years' imprisonment and strokes of the rattan held that acid throwing is a serious offence. The people who indulge in acid throwing are savages who deserve no mercy, as they show no mercy to the people they attack. It is also absolutely no mitigation in a case of this kind to say that it is a first offence.

In *Public Prosecutor v. Leo Say and two others*[24], the court refused to consider humanitarian factors such as aged parents and financial hardships where the offence was a serious one. In this case the three accused pleaded guilty to the charge of culpable homicide not amounting to murder and pleaded for leniency on the ground that they had aged parents and families to look after and also that second and third accused had no previous criminal record. It was held that the fact a man has not much

[22] A.I.R 1972 S.C. 2434.
[23] (1959) 25 M.L.J 19
[24] [1985] 2 C.L.J 155

of a criminal record or none at all, is not a powerful factor to be taken into consideration when the offence committed is a grave one. As for the plea that they have aged parents and families to look after, hardship to families is not a matter, which the court can consider by way of reducing sentence.

Where the offender has a criminal record but his most recent offence is quite different, from other offences committed by him in the past, his remaining credit for good character may be enhanced[25]. The court may ignore certain kinds of previous convictions when they are unrelated to the circumstances of the present offence. This does not mean that such a person will be treated as if he had no previous convictions[26]. In *Public Prosecutor v. Jafa Bin Daud*[27], the respondent pleaded guilty for being in possession of 0.21 grams of heroin, an offence under Section 12(2)(a) the Dangerous Drugs Act 1952. The learned Magistrate convicted and sentenced him to 8 months imprisonment. The Public Prosecutor appealed against the sentence and argued that the sentence was grossly inadequate on the ground that the Magistrate had failed to appreciate the seriousness of offence and the fact that the respondent had five previous convictions –two of which were connected with drugs whilst the other three involved theft. The court allowed the appeal and held that in assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. To determine this, the Magistrate should call evidence or information regarding the background, antecedent and character of the accused. Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences committed previously were of similar nature as one with which he

[25] Thomas Op. cit. , p.202.
[26] Id. p.203
[27] [1981] 1 M.L.J 316.

was presently charged. Then the court must consider whether the previous sentences imposed on him had any deterrent effect on him. Where he is found to be persistent offender for similar types of offences then it is in the interest of justice that a deterrent sentence should be passed. In such a situation the offence with which he is currently charged can rarely constitute mitigating factor.

5.4 GOOD CHARACTER

Good character also plays some role in preference for a non-custodial sentence for a crime which may be grave enough to justify imprisonment.[28] In many cases the mitigating effect of good character can be found.

In *Public Prosecutor v. Yap Chong Fatt*[29], the respondent aged 24 and a first offender was convicted for house breaking by a Magistrate Court and sentenced to two weeks imprisonment which, he duly served. The Public Prosecutor appealed against the inadequacy of sentence. But the court was not inclined to approve a short-term of imprisonment. Dismissing the appeal, Thomson C.J. observed:

> ". . . If the offence is too serious for that and merits imprisonment, then a sentence of imprisonment should be imposed which will have some effect not only on the offender but also as a deterrent which will give Prison Department some opportunity of trying to remedy such defect of character as there may be"[30].

In this case, the court decided not to send him back to the prison in the circumstances of the case for a further short duration which would have been unproductive for the offender, society and prison administration.

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[28] Christopher J.Emmins., *A Practical Approach to Sentencing*, London, Blackstone Press Limited (1985) 272.
[29] (1963) 29 M.L.J 136.
[30] Id. 137.

In the Indian case, *Dilbag Singh v. State of Punjab*[31] the accused was sentenced to rigorous imprisonment for one year and fine of Rs.200 for causing simple injury, 2 years imprisonment for being vicariously found guilty under Section 324/34 of the Indian Penal Code. In addition, he was punished for causing hurt to the daughter of the deceased with rigorous imprisonment of one year together with a fine of Rs.200. On appeal, the Supreme Court of India directed the Chief Probation Officer Punjab to submit a report as to the social circumstance and other relevant factors bearing on the consideration of eligibility of the petitioner to probation. The probationer's officers report stated that the prisoner's character was fairly upright and he was the first offender not a recidivist. After perusal of the probation officer's report Krishna Iyer J. of the Supreme Court directed the release of the offender under Section 360 of the Criminal Procedure Code to keep the peace and be of good behaviour. In this case the learned judge found the social milieu, the domestic responsibilities, the respect for the former Sarpanch (Village head man) he showed, the general good will he commanded could be regarded as mitigating factors.

5.5 CIRCUMSTANCES RESULTING IN THE COMMISSION OF THE OFFENCE

In sentencing the accused, the trial court also takes into consideration the circumstances that were the moving factors in the commission of the offence. A crime may be the result of provocation or domestic tension and an offence of property may be committed due to financial difficulties. Drink is another element in the commission of many offences. To what extent these factors affect sentencing patterns of the courts

[31] A.I.R. 1979 S.C. 680.

in mitigation of punishment particularly the offences punishable with short term imprisonment can be illustrated by reference to a number of decided cases.

Provocation is one of the mitigating factors recognised under the Malaysian and Indian Criminal Codes. Besides the offence of murder, the presence of provocation may reduce murder to culpable homicide not amounting to murder[32],and also provocation may reduce the gravity of the offences of causing hurt and grievous hurt[33]. The law laid down in the celebrated Indian decision in *K.M.Nanavati v. State of Maharshatra*[34] *mutatis mutandis* applies to provocation in hurt cases when the term of imprisonment is reduced.

In *Emperor v. Bhagwan Chhagan*[35], the accused was charged with causing grievous hurt to his wife under grave and sudden provocation. The provocation in this case was that the accused one night found his wife misbehaving with another man. He then and there attacked her and cut her nose with a knife. He was tried and convicted of an offence under S.335 of the Indian Penal Code by a Magistrate's Court and sentenced to 4 months rigorous imprisonment. The Sessions Judge being dissatisfied with the decision of the Magistrate referred the case to the High Court. It was held by the High Court that the particular act of which the accused was found guilty was the one which showed deliberate design. Therefore, the plea of grave and sudden provocation or the excuse it implied did not seem to have by any means the same effect as in the case of a man who in sudden and provoked anger struck a blow, however serious that blow may be. In case of such provocation there is no deliberate

[32] Sub-section 1 of Section 300 of the Malaysian and the Indian Penal Code.
[33] See ss. 323, 325, 334 and 335 of the Malaysian and the Indian Penal Code.
[34] For details see (1962) Bombay Law Report 488.
[35] (1914) Bombay Law reports 69.

design. As the court found deliberate design of a peculiarly brutal and cruel character, the sentence was enhanced to two years rigorous imprisonment.

Similarly, in *Ismail Umar v. Emperor*[36], the accused cut-off the nose of his wife. There was neither a ground nor was there any evidence to suggest that there was anything amounting to serious provocation. The accused was sentenced to nine months imprisonment. He appealed against his conviction. The learned judges of the High Court relied on Bhagwan Chhagam and held in this case there was nothing in the evidence to suggest that there was anything amounting to serious provocation. In the circumstances of the case the sentence was found to be inadequate and was enhanced.

These cases show that provocation can be a mitigating factor if the offences are not very serious and punishable with short-term imprisonment. However, where the act is serious and imparts deliberate design of a peculiarly brutal character, the courts are more inclined to enhance the sentence.

Alcoholism is often regarded one aggravating factor in sentencing process. But in special circumstances it may be considered in mitigation of sentence. In *Raja Izzuddin Shah v. Public Prosecutor*[37], the accused pleaded guilty for assaulting a public servant and he was sentenced to 3 months imprisonment. He appealed against sentence. Hashim Yeop Sani J. regarded the surrounding circumstances (repentance and intoxication of the offender) of the case as a mitigating factor and the sentence of 3 months imprisonment was substituted with good behaviour bond for 2 years under Section 294 of the C.P.C

[36] (1938) 39 Cr.L.J. 1938; also see *Emperor v. Ghulam Nabi* (1932) 33 Cr. L.J. 368.
[37] (1979) 1 M.L.J. 270

Financial difficulties, domestic or emotional stress are other factors which may be considered in mitigation of sentence. Where an offender commits an offence when he is hard pressed to meet the needs of his family he may be treated sympathetically by the sentencer. A person who sees the offence of violence committed against his wife or husband or any other close relative or a third person who has become involved with one of them, may be sympathetically treated if he is charged for assaulting the person so involved.

5.6 THE PLEA OF GUILTY

Pleading guilty is a well established practice in the criminal courts. One of the advantages of this system is that the under trial prisoner has to spend lesser time in the jail by pleading guilty and avoiding a long drawn trial. It also operates as a sentence discount. The discount for such a plea has been found quite substantial in some cases. In one of the survey of 2000 cases made by David Moxon average reduction in prison sentences for pleading guilty was 22% and in another survey of 3000 cases by Roger Hood the reduction in sentence on the basis of plea of guilty was found to be 31%[38].Looking at the precedents in favour of the plea of guilty, the British Parliament gave legislative effect to this established practice of the court in Section 48 of the Criminal Justice and Public Order Act 1994.

The Royal Commission on Criminal Justice, 1993 also recommended measures to encourage defendants to plead guilty at an earlier stage in order to avoid waste of public resources caused by last minute changes in the plea[39].

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[38] Andrew Ashworth, *Sentencing and Criminal Justice*, London, Butterworth (1995) p.136.
[39] Ibid.

In *Melavani v. Public Prosecutor*[40], the appellant along with two others pleaded guilty of having in possession of U.S. currency knowing them to be counterfeit and intending to use them as genuine. The trial judge accepted the plea and sentenced the appellant for imprisonment up to three years. He appealed against the sentence on the grounds that trial judge had failed to take his plea as a mitigating factor. It was held that where an accused person pleads guilty the court in assessing sentence ought to consider such a plea as a mitigating factor. What weight ought to be given by the court depends on the other facts made known to the court at the time sentence is considered. Taking into consideration the fact that the accused had pleaded guilty and had a good character, the court reduced the sentence to two years' imprisonment.

Plea of guilt may result not only in reduction of sentence but also in replacement of prison term by a non-custodial measure like binding over or probation. In the Indian case of *Mafaldina Fernandes v. State*[41] the accused pleaded guilty on a charge of theft under Section 380 of the Indian Penal Code and on the basis of his plea the Magistrate convicted and sentenced her to three months imprisonment. She lodged an appeal in the Sessions Court stating that she being a first offender and a female of tender age, being 16, should not have been denied the benefit of Section 6 of the Probation of Offenders Act. The Sessions Judge treated the memorandum of appeal as a petition for revision and referred the case to the High Court which recommended that the sentence be quashed and the case be resumed to the trial court for determining if the provisions of Section 6 of the Probation of Offenders Act were attracted. It was held that the trial judge had gone wrong in not examining the case of

[40] (1971) 1 M.L.J 137.
[41] 1968 Cri. L. J. 1340; A.I.R 1968 Goa 103.

the convict in terms of Section 6 of the Act. Section 6(1) vests the court with ample discretionary powers on the point whether or not to allow the offender the benefits of the Act. If the court feels in the context of his antecedents or the particulars of the offence committed by him. In this case the data on the record did not indicate under what circumstances the offence had been committed by the accused. Therefore the sentence was quashed.

On the other hand, the circumstances of the case may require a prison sentence in spite of plea of guilt. In *Public Prosecutor v. Tan Eng Hock*[42], the respondent pleaded guilty to the charge of theft of a motor car. The learned Magistrate in assessing the sentence took into account the fact that the accused was a first offender and he had a wife and a child and aged parents to support. He therefore bound over the accused under Section 173A of the C.P.C. The Public Prosecutor appealed.

Allowing the appeal it was held that an order of binding over under Section 173A of the C.P.C after recording conviction is illegal. Having regard to the number of cases of car theft, a sentence of binding over is neither appropriate nor relevant. Apart from the fact that the accused is a first offender, there was no mitigating factor.

A perusal of the cases discussed above shows that the plea of guilty will not have serious impact on the sentencer if the offence is serious and the public interest is involved. However it does act as a mitigating factor when the offence is minor and the accused has a good record of antecedents. The acceptance of the plea of guilty can also mitigate the sentence of those offenders who might be convicted for minor

[42] (1969) 2 M.L.J 15

offences punishable with short term imprisonment. In reducing the sentence of such offender the court may use non-custodial measures.

5.7 HEALTH OF THE PRISONER

Health of the prisoner is a relevant issue for all types of prisoners under trials, long term prisoners and short-term prisoners. This factor also operates in mitigation of sentence at court level. A prisoner having ill health ought not to linger on in jail. The court therefore gives due consideration to the health of the offender.

In the Indian case of *Smt. Urmila Agnihotri v. State & Anor*[43], the petitioner was charged and convicted before the Magistrate's court under Section 132/135 of the Customs Act and sentenced to one year rigorous imprisonment and a fine of Rs.2500. The petitioner had submitted medical certificates and other related documents in support of her case. She had also filed an affidavit that her husband was suffering from angina and had undergone surgery. She was an aged woman of 61 years and had never been involved in any other criminal case. The learned Magistrate had failed to take into consideration health and serious illness of the petitioner while awarding sentence. The learned High Court judge considering the ill health, advanced age of the petitioner and he husband's ailment reduced the sentence of imprisonment (she had already remained behind the bars for 20 days), to the one already undergone. However, the penalty of fine was enhanced.

The medical and psychiatric reports of the offender may be helpful to the sentencer and on some occasions they are essential where the mental or physical

[43] 1992 (1) *Crimes* 965.

health of the offender is one of the mitigating factor and the court is required to make a probation order with a condition of treatment.

The Magistrate Courts in England are empowered under Section 30 of the Magistrate's Courts Act 1980 to ask for an inquiry into the offender's physical or mental condition once the court is satisfied that the accused did the act or made the omission of the offence charged before awarding sentence.

The courts in Malaysia and India do consider health of the offender as a mitigating factor. But, there is no statutory requirement as in England to ask for such an inquiry before awarding sentence. However, in India if the offender is emotionally unstable, the court making the probation order may make ask the probation officer to have a medical or psychiatric examination of the offender done and report to the court for enabling it to decide upon the action to be taken under the Act[44].

5.8 EFFECT OF SENTENCE ON FAMILY

A sentence may cause suffering to the offender's family or may result in the loss of the job or occupation of the offender. It is very common to make submissions on behalf of the offender that he is the sole breadwinner of the family and has small children and aged parents to support. In many cases it has been observed that the hardship faced by the offender or his children is rejected by the court as a mitigating factor specially when the court finds that offence committed by the accused is grave enough to require a deterrent punishment.

[44]See for example Rule 17(iii) of the Bihar Probation of Offenders Rule and Rule 27(2) of the Maharashtra Probation of Offenders Rule, 1966.

Family hardship may be a ground of mitigation where the particular circumstances of the family are such[45] that imprisonment of the offender may result in severe hardship to the offender's family or some other persons who are dependant on him. In *Pashara Singh & Another v. State of Punjab*[46], the accused and his brother co-accused were found guilty by the trial judge for the offences under Section 447, 323 and 324 of the Indian Penal Code. As the accused were not previous convicts, had no previous convictions, they were granted the benefit of probation under Section 360 of the Code of Criminal Procedure. On appeal to the High Court the accused were sentenced to three years rigorous imprisonment and a fine of Rs.3000 for the first charge and six months on imprisonment on the second charge.

Aggrieved by the judgement of High Court both the accused appealed to the Supreme Court. During the pendancy of the appeal the other co-accused (Lohara Singh), his brother died. The Supreme Court found that the incident took place about 11 years ago. The accused a cultivator, had already suffered the agony of the case in the trial court for more than one year and for more than 10 years in the High Court. The co-accused, his real brother, had died during pendancy of the appeal. The burden of looking after the widow and three minor children of his deceased brother, co-accused had fallen on the shoulders of the appellant besides the burden of his own wife and three minor children. The accused has remained in jail for 52 days during the trial and is now continuing in jail during the pendency of the appeal before the Supreme Court. Taking into account the entire facts and circumstances of the case the accused appellant was awarded a sentence of imprisonment of the period already undergone by him.

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[45] Thomas, Op. cit. ,p. 212.
[46] 1992 (3) Crimes p. 630.

In cases where the offences are serious in nature, the courts are less inclined to consider mitigating factors, in the sentencing process. But where the offence is less serious the courts are willing to look sympathetically the effect of sentencing on the offender, his family and dependants. On the other hand, where the offences are of serious nature the courts are less inclined to consider impact of sentence on the family. Most of the offences committed by this category of offenders are punishable with short-term imprisonment. The courts while considering mitigating factors may deal with such offenders by non-custodial measures so as to avoid a prison term.

In *Public Prosecutor v. Leo Say Ors*[47], the three accused pleaded guilty to an offence under Section 304 of the Penal Code and pleaded for leniency on the ground that they had aged parents and families to look after. Chan J. declined to be moved by the plea in mitigation and held that the offenders have brought all this hardship on themselves and their families. If there were really concerned about their plight then they should have thought of them before they embarked on this criminal enterprise.

In *Datuk Haji Harun bin Haji Idris & Ors v. Public Prosecutor*[48], where in mitigation it was pleaded that if convicted the accused would lose their job, the court was not influenced and enhanced the sentences.

In *Public Prosecutor v. Abdul Rahim bin Abdul Satar*[49], the accused was tried for three counts of corruption under Prevention of Corruption Act 1961. He was acquitted in respect of the first two charges and convicted for the third offence. The Public Prosecutor appealed against leniency in sentence of RM5000 fine. Wan

[47] 1985 2 C.L.J. 155
[48] [1978] 1 M.L.J 240
[49] [1990] 3 M.L.J 188

Yahya J. was compassionate and sympathetic to the accused because of the long service, pension and gratuity. Despite this, the learned judge enhanced sentence of fine to RM7500 or in default to two years imprisonment.

5.9 BEHAVIOUR SUBSEQUENT TO THE COMMISSION OF OFFENCE

The behaviour of the offender, for example repentance, after the commission of the offence may be a factor in replacing a term of imprisonment with non-custodial measures. In *Raza Izzuddin Shah v. Public Prosecutor*[50], the accused had pleaded guilty to the offence of assaulting a public servant. He was convicted and sentenced to three months imprisonment. He appealed against sentence. On appeal, the learned judge considered repentance by the offender in mitigation of sentence and observed:

The primary purpose of punishment is reformatory. It is clear in this case that the appellant has clearly stated that he has repented and would not make the same mistake again. Under the circumstances the public interest would be best served by setting aside the sentence of imprisonment and substituting therefore an order under Section 294 (1) of the C.P.C and the appellant should enter a bond with one surety in the sum of $1000 for a period of two years and in the meantime to keep peace and be of good behaviour.

The offender who assists the police in the investigation of the crime, or provides useful information in the apprehension of other persons or the recovery of the property the subject matter of the offence may be considered in mitigation of sentence. He may expect lighter sentence for such co-operation.

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[50] [1979] 1 M.L.J 270.

An offender may decide to return the property to his victim or he may make reparation to the victim's family where the victim's injury in a case of accident. These facts may also fall in the category of mitigating factors.

5.10 CONCLUSION

Mitigating factors play an important role in imposition of sentence appropriate to the offence committed by the accused. A large number of offenders tried by the courts are those who have committed offences punishable with short term imprisonment. As we have observed earlier, short term imprisonment does not serve any useful purpose, rather it converts first time offenders into professional criminals. In deciding whether the sentence appropriate to the offence should be improved or whether the court can show some leniency to the accused, the court should give due regard to mitigating factors, which tell in his favour, such as age of the offender, his record, good character, circumstances resulting in the commission of the offence, plea of guilty, health of offender, effect of conviction on sentence and other mitigating factors. These factors may be helpful to the courts to decide whether to apply custodial or con-custodial measures of punishment. In Malaysia statutory law provides for the consideration of mitigating factors and the courts are required to incorporate in the courts notes these factors. In India no specific provision exists but the courts do consider these factors. It is submitted that in India the provision should be made for the consideration of mitigating factors on the lines of the Malaysian law.

CHAPTER SIX

SHORT-TERM IMPRISONMENT AND ALTERNATIVES UNDER ISLAMIC PENAL SYSTEM

6.1 INTRODUCTION

The earlier chapters of this work have covered the contemporary problems of short-term imprisonment under the penal system of India and Malaysia. The system of imprisonment and concomitant laws have their origin in western philosophy, laws and practices. There is another system of law quite different from western type penal system. This other system is the Islamic penal law system. This chapter is therefore devoted to the examination of the position of imprisonment under the Islamic penal system.

It may be noted at the outset that Islamic punishment is a mixture of mandatory, retaliatory and discretionary punishments. There are offences where a fixed penalty is prescribed under Islamic law whereas the same offence is punishable under the western based penal system by the discretionary sentence of imprisonment. Again the Islamic system confers a right on the victim or next of kin of the deceased to demand retaliation or to remit the punishment altogether, even in some major crimes, like murder, which under the Malaysian Law is punished with the mandatory death sentence. Further, the Islamic law gives the power to the Ruler to create by legislation offences under the Islamic concept of *siyasa* and to provide discretionary (*ta'zir*) punishments. Imprisonment in Islamic law falls under the category of *ta'zir*

punishment. The offences for which it could be prescribed can be created by legislation.

This chapter therefore, examines punishments under Islamic law with particular attention to sentence of imprisonment, its utility and efficacy in relation to short term imprisonment.

6.2 PUNISHMENTS UNDER THE ISLAMIC PENAL SYSTEM

The Islamic conception of justice is based on fair dealing and equity. Allah commands men to judge people with justice. To achieve justice in the field of criminal law, Islam has provided various punishments. Punishments as envisaged by Islamic Criminal law fall into three groups. (i) Hudud; (ii) Qisas and Diyat (Retaliation and Blood money) (iii) *Ta'zir* (Discretionary punishment)

6.2.1 Hudud

These are the crimes for which the kind and quantum of punishment have been fixed by the Quran as of right of God Almighty. These punishments cannot be increased, decreased or altered by the Ruler or by the judge. The offences for which Hudud punishments are prescribed are as follows:

(a) Adultery and Fornication (zina)

(b) False accusation of adultery

(c) Theft

(d) Highway robbery

(e) Drinking wine

(f) Apostasy

The hadd being a right of Allah, no compromise, settlement, or pardon can be made. The punishments laid down for these offences are deterrent and reformative in nature. The offence of adultery is punishable with stoning to death (rajm), if committed by married persons. But, the offence of fornication committed by an unmarried person is punishable by hundred stripes. The person making false accusation of adultery against a married man or woman will receive 80 stripes. The offence of theft is punishable with cutting of the hand. The person committing highway robbery (hiraba) will lose hands and feet and if the murder is committed in the process of robbery the offender will suffer death either by sword or crucifixion. The offence of drinking wine carries the punishments of 80 stripes. The offence of apostasy is punishable in some cases with death[1].

6.2.2 Qisas and Diyat (Retaliation and Blood Money)

In Islamic criminal law, some offences have been made punishable by way of retaliation or blood money. The offences so punishable are pre-meditated murder, semi-premeditated murder, murder by mistake and hurt. The punishment for these offences are said to be the right of the next of kin of the victims, which can be, remitted or altered by them in the capacity as legal heirs. The right to remit retaliation is also associated with the right to receive the *diyat.* The *diyat* is the compensation fixed to satisfy the victim or deceased relatives[2].

6.2.3 Ta'zir (Penal punishment)

Crimes other than Hudud, Qisas and Diyat are punishable by "*ta'zir*" i.e. discretionary punishment. These are the offences for which punishments are not

[1] There are two views concerning this punishment. Some Muslim scholars hold the view that apostasy is punishable with death, while others say apostasy should be punished with *ta'zir* and must be determined according to the circumstances of the case. See Mohamed S. El-Awa, *Punishment in Islamic Law*, Indianapolis, American Trust Publications (1982) p.62.
[2] Mohammad Iqbal Siddiqi, *The Penal Law of Islam*, Lahore, Kazi Publications (1979) p. 151.

specifically mentioned in the Holy Quran or the Sunnah of the Prophet (S.A.W). However, they have been made punishable because they represent the acts of disobedience to God's commandments and lead the people astray. The legislator, Rulers or judges have been given a discretion to prescribe punishment in accordance with the nature and the extent of the crime and the circumstances of the case.

Islamic punishments are deterrent in nature as well as reformative. We have observed in the earlier chapters that imprisonment has proved to be a source of producing criminals besides being a burden on the public exchequer[3]. Hudud punishments are fixed. There is no scope to vary the punishment in this category of offences. *Ta'zir* or discretionary punishments are not clearly specified. However, they are left to the discretion of the Ruler or the Court to impose in accordance with the need to reform the criminals. The discussion that now follows begins with objects of punishment in Islamic criminal law followed by an attempt to look into the viability of *Ta'zir* as a mode of reformation of the offender and as an alternative to short-term imprisonment.

6.3 OBJECTS OF PUNISHMENT IN ISLAMIC PENAL SYSTEM

Islamic criminal law regards punishment as a social necessity imposed to protect society and safeguard man's interest. Necessity is determined according to its importance for the protection of society. The object of punishment in Islamic law is the reformation of the offender and a lesson to the public. These objects can be summarised as follows.

[3] Tanzil-ur-Rahman, *Crime and Punishment in Islam*, Pakistan Legal Decisions (1980) p. 125.

(1) One of the objects of punishment is to serve as a deterring and discouraging factor to the criminals. The punishment of the offender serves as a lesson to others so that the inclination to crime is removed and people may not dare to commit crime. Hence, in Islamic law all punishments are executed in public before a large crowd. This public display of punishment is intended to have deterrent effect on prospective offenders. The, Quran says to the effect: "and let a party of the believers witness their punishments" (Surah al-Nur (24):2).

The exemplary punishment of an obstinate wrong doer in Islam carries out a psychological operation on all those in the society having criminal intentions[4]. This is the purpose of inviting the people to witness the execution of punishment.

(2) The other object of punishment is to rehabilitate or reform the wrong doers. Punishment other than those for *Hadd* and *Qisas* should be of such a nature that it might admonish and reform the offender and prevent him from repeating the crime again. It should be flexible so that the Court may have the choice to choose the kind of punishment most suitable to the circumstances of the case.

We find in the Holy Quran that whenever punishment has been described for the commission of an offence it has been concluded either by way of advice or threat of punishment in the life hereafter. For example in the case or murder, the Holy Quran says

"And any who does this shall (not only) receive the punishment (but) the chastisement shall be doubled to him on the Day of Judgement and he shall abide therein in abasement." (Surah al-Furqan (25): 68-69).

The emphasis on reformation can be found reflected in various ayaat of the Holy Quran. For example, the Holy Quran provides:

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[4] supra note 2, p. 23.

"But whoever repents after his iniquity and reforms himself Allah will turn to him in forgiveness, for Allah is oft Forgiving, most Merciful." (Surah al-Maidah, 5:39).

(3) Another object of punishment is preservation of life and protection of honour and chastity. In the modern criminal justice system more importance is given to the life of a man and the state becomes a party in all such cases and no attention is paid to the aggrieved. The State punishes the offender unmindful of the fact that revenge exists or is removed out of the mind of the aggrieved party. In this way neither the feelings of revenge are satisfied nor reoccurrence of crime is checked. The result is that a long chain of crime continues between the parties. Under the Islamic criminal justice the right of revenge is allowed. Life for life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and wounds for equal is the law. But this right of revenge is the right of the injured party or of his heirs and not the State. The injured party can forgive the accused or ask for compensation instead of revenge. Thus the main purpose of punishment in Islamic law is to eradicate the grievance from the heart and mind of the injured party.

6.4 TA'ZIR OR PENAL PUNISHMENTS

Ta'zir literally means to prevent, to correct, to reform or to avoid. It is defined as "discretionary punishment to be inflicted for transgression against Allah, or against an individual, for which there is neither a fixed punishment nor a penance or expiation." This definition does not cover all those crimes for which specific punishments are prescribed by Shariah i.e. Holy Quran and Sunnah of the Prophet Muhammad (S.A.W.) and has been left to the discretion of the judge, or the Ruler to fix it in accordance with the prevailing circumstances of the case so as to treat and

reform the offender and to prevent him from re-offending and restraining others from committing similar offences.

The term tazir has been defined by Al-Mawardi, a Shafei jurist as "punishment inflicted in cases of crimes for which the law (Shariah) has not enacted written penalties. The rules relating to it differ depending upon the circumstances in which it is inflicted and the circumstances with respect to the culprit."[5] There is concurrence amongst the jurists that tazir also refers to such offences for which no punishment has been fixed in the basic sources of Islamic Criminal law. I.e. the Quran and Sunnah of the Prophet (S.A.W.) [4.] These sources empower the Ruler to declare such acts unlawful which are detrimental to the peace and tranquillity of the State under the prevailing circumstances keeping in view fundamental principles of Islamic criminal justice. The Ruler or the Qadi can also formulate rules and regulations. These rules and regulations should not be arbitrary and also should not be contrary to any injunction of Quran or Sunnah. The right to legislate in the field is limited. The Quran says:

"O you who believe! Obey Allah and obey the Messenger and those of you who are in authority." (Surah an-Nisa (4):59).

The approach of Islamic Criminal law towards the punishment of tazir offences in fact predates out yet is in consonance with the modern methods of reformation and treatment of the offender. It does not prescribe a definite penalty for each tazir offence, but rather leaves it to the Ruler or the Qadi to pass any sentence that may be appropriate in the circumstances of each case. It is with this reason

[5] Al-Mawardi, *Al-ahkam al-Sultaniyyah* pp. 236-237.

Islamic law has provided numerous punishments ranging from mild punishment to severe punishment and has conferred the powers on the Court to impose any of them as it seems fit for the reformation of the offender and safety and security of the society. Apart from this the Courts have the power to impose one or more of the punishments necessary for the correction of the criminal or it may suspend the punishment if it thinks necessary for the reformation of the offender. In fact the Shariah gives greater latitude to the Courts to use any corrective method that may reform the offender and protect the society.

6.5 TYPES OF TAZIRS OR PENAL PUNISHMENTS

Ta'zir punishments under Islamic law disclose a variety of measures against the offenders. They include corporal punishment, monetary punishment, imprisonment and other non-custodial measures.

6.5.1 Caning

The punishment for caning is one of the penalties recognised in Islamic criminal law. It has been used as hadd punishment for adultery, false allegation of adultery and drinking alcohol. It has also been given for many offences punishable with *ta'zir*. But it is not permitted to impose hadd where it is not ordained. So the Prophet (S.A.W.), while supporting this punishment for *ta'zir* said; "He who punishes a criminal with hadd in a crime which is not liable to hadd is a trangressor."[6]

The punishment of caning has also been given in crimes relating to *ta'zir* by the Caliphs and continued in operation to later periods.

[6] Ibn Qudamah, Al Mughmi Vol. X p. 354.

One of the most important features of caning is that neither the imposition of this punishment costs the State nor the offender suffers his job. The family is not deprived the maintenance and the offender after imposition of sentence is free to go and join the family. One other striking feature of caning is that the offender is saved from the contaminated and corrupt influences of prison life[7]. The punishment of caning is provided in Malaysia for some offences[8], but it has been abolished in India since 1955.

6.5.2 Banishment or Exile

Banishment or expulsion is one of the punishments prescribed under Islamic law for offences liable as *ta'zir*. Under this punishment the offender is driven away from his town or village to another town or village of the same country or another country. The punishment is given when there is likelihood that the offender may contaminate and influence others.

There is difference of opinion among various schools of thought as to the period of banishment. According to Imam Abu Hanifa the period of banishment may be more than one year. While Shafei and Hanbali jurists are of the view that the offender should not be exiled up to one year, as one year is a period prescribed for adultery, which falls under the *Hadd*. The jurists who hold the view that period of exile should be more than one year, do not fix any definite period of punishment, rather empower the Ruler to allow the offender to end exile if the offender repents or is reformed.

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[7] Abdul Qadir Oudah, *Criminal law of Islam*, Karachi, International Islamic Publications Vol. 3 (1987) p. 101.

[8] The punishment of whipping is provided for thirty-two offences under the Malaysia Penal Code. The offences include assault or criminal force (S. 356), rape and unnatural offences (ss. 376, 377, 377B, 377C, 377D and 377E), theft (ss. 379, 380 and 382), extortion (ss. 384, 385, 386 and 387), robbery (ss.

6.5.3 Imprisonment (al-Habs)

Imprisonment is one of the penal punishments used for offences liable to *ta'zir*. It was known as "al-Habs" which means confinement. The confinement may be in a house, mosque or any other place, or the offender may be handed over to another person to keep him in custody or to restrict his further movement[9]. The punishment of imprisonment has been in existence in pre-Islamic Arabs. Islam did not prohibit it, rather it retained it.

Imprisonment as a form of punishment has been is use during the period of the Prophet (S.A.W.). The following ahadith show the practice of imprisonment:

1. It has been said on the authority of Abu Hurairah that the Prophet (S.A.W) confined a man on account of some allegations against him[10].
2. In another hadith it is reported that the Prophet (S.A.W.) detained a man suspected of murder for sometime of the day and then freed him[11].
3. It is stated on the authority of Hirmas Ibn Habib who related from his father that he owed a debt to him and he was not paying it. The Prophet said, "confine him"[12].
4. It is also stated that women prisoners were confined in a separate place during the period of the Prophet (S.A.W.)[13].

   During the period of the Prophet (S.A.W.) and caliph Abu Bakar there was no place specially built for the confinement of prisoners, But when the territory of the Islamic State expanded and the population increased during the time of Caliph

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388, 389, 393, 394, 395, 396, 397, 399, 400, 401 and 402), mischief (s. 430A) and criminal trespass (ss. 453, 454, 455, 456, 457, 458 and 459).

[9] Ibn al-Qayyim, al-Turuq al-Hukumiyyah pp. 101-102.

[10] Hakim, Al-Mustadrak, Vol. IV p. 104.

[11] Al-Baihaqi, Al-Sunan Al-Kubra, Vol. VI p.53.

[12] Sunan Abu Daud, Vol. II p.1.

[13] al-Kattami abd. Al hay, Nizam al Hukumah al-Nawabwiyyah p. 288.

Umar he purchased a house from Sufwan bin Umayyah for four thousand dirhams and made it as a jail[14]. Later on other caliphs and Muslim Rulers established prisons for the confinement of convicts, suspected offenders and for the persons awaiting trials.

The majority of the Jurists (Fuqaha) are of the view that the Qadi or judge can impose sentence of imprisonment for crimes liable to *ta'zir* and it is the responsibility of the Ruler to establish prisons. The punishment of imprisonment can be awarded exclusively or it can also be given along with other punishments such as a fine or whipping if it is expedient in the circumstances of the case.

In Shariah imprisonment is of two kinds, limited for a term or that of unlimited term. The punishment of imprisonment may be given for a limited period. The minimum period for imprisonment is one day. But the jurists differ on the unlimited term of imprisonment. Some jurists fix the maximum period to six months, while others fix it one year and some hold the view that maximum period of imprisonment will be left to the Ruler to decide[15]. The Maliki, Hanafi and Hanbali Schools hold the view that maximum period of imprisonment cannot be fixed because it differs for each Offence and from person to person. However, according to Shafei's school, the maximum period of imprisonment is one month for investigation and six months as punishment and in any case it must not be more than one year. This view is based on the analogy that the offence of Zina (fornication) committed by an unmarried person is punishable with banishment for one year therefore imprisonment as *ta'zir* must not go beyond the one year of the

[14] Ibn al-Qayyim p. 102.
[15] Oudah Vol. 3 p. 96.

banishment permitted for fornication which is hadd punishment according to Shafei jurists[16]. However, some of the Shafei jurists also hold the view similar to the other schools of jurisprudence as to the indefinite period of imprisonment. Accordingly, the Qadi is free to determine the maximum period of definite imprisonment as he thinks proper depending on the types of crime committed by the accused and the period of imprisonment required for the reformation. Besides, the Islamic Penal system also allows the Qadi to impose imprisonment as an additional penalty if it is required according to the circumstances of the case[17].

The evils of imprisonment were well known to the jurists of Islamic law. They discouraged the imposition of imprisonment rather they encouraged to the use of other types of *ta'zir* punishments. Islamic law permitted unlimited terms of imprisonment to be applied on those offenders who had committed serious offences or were habitual criminals and who had no sign of reformation by any other kind of punishment. The offenders will remain in prison till they repent or mend their ways. If they are not reclaimed they will remain in prison and the society will be protected from dangerous criminals. The concept of unlimited imprisonment was introduced in Europe in the end of the 19th century, while Islamic law introduced it thirteen hundred years before[18].

As we have observed in the earlier chapters of this work that the problem of prisons and their inmates is very alarming. Imprisonment is used as the basic punishment for most of the offences. The result is that most of the prisons are

[16] El Awa op. cit. P. 105.
[17] Id. 105.
[18] Oudah Vol. 3 p. 99.

filled beyond capacity. Besides, the prisons are the centres for training the offenders in further crimes, notwithstanding the fact that prisons are established to reform the prisoners. The association and mixing together provide an opportunity to the prisoners to plan criminal activities and benefit from each others' knowledge and expertise. This knowledge which they receive during their confinement may turn first offenders into professional criminals.

The viewpoint of Islamic criminal law to imprisonment is quite different from the modern penal system. Under the modern penal system, imprisonment is the primary penalty for major as well as minor offences whereas under Islamic penal system, it is a secondary punishment awarded for minor offences as the court has a discretion to impose it or not. If looking at the record of the offender, the Court is of the view that this punishment will not serve any purpose, it will not impose it.

The experience of the countries where Islamic law is enforced is that the number of prisoners is comparatively low whereas in other countries such as Malaysia and India the number of prisoners is very high[19]. The reason for such a limited number of prisoners is that Shariah gives wide options to the Courts to award punishments from a variety of penalties. The Courts are free to select any one of the mode of punishments prescribed by Shariah. This approach of Shariah is far ahead of modern penal system. The Courts are encouraged to use other *ta'zir* punishments instead of using imprisonment as a method of punishment.

[19] See Chapter 3.

6.6 OTHER PENAL MEASURES

Islam gives considerable importance to reformation of offender by searching his own soul and at the same time treating him as an object of deterrence. The following are the measures where these elements are present in abundance.

6.6.1 Fines and Seizure of Property (al-Gharamah wal-Musadarah)

Fine is one of the punishments given in crimes liable to *ta'zir*. During the period of Prophet (S.A.W.) fines were imposed in cases of *ta'zir*. However, the Fuqaha (jurists) appear to be divided as to its legality.

One view is held by jurists of Hanafi and some of the Shafei's. Imam Malik and Abu Yusuf of the Hanafi School and some Shafei jurists are of the opinion that fines can be imposed in some crimes liable to *ta'zir*[20]. Explaining the view of Abu Yusuf, the Hanafi commentators say that the Ruler or the judge does not impose fine for the public exchequer but in order to keep the person away from the crime until he has repented. They support this view on the ground that no one is permitted to take another person's money without any legal reason. If it appears that the offender has not repented the money so realised from the offender may be spent on public welfare[21].

On the other hand, some fuqaha (jurists) deny fine as a lawful *ta'zir* punishment and claim that it was lawful in the beginning of Islam but later it was abrogated. This view was held by Hanafi jurist Tahawi in his book, "Sharh Ma ani At al Athar" (Explanation of the Meanings of the Traditions). The view of Tahawi as to abrogation of fine or financial penalties was severely criticised and rejected by Imam

[20] See Ibn al-Qayyum, al-Turuq al-Hukkuniyya p.280-290.
[21] El-Awa op. cit. p.104.

Ibn Taimiyya and his disciple Ibn al-Qayyum based on the Prophet's practices and some of his companions' decisions[22]. While supporting fine as one of punishments, Ibn al-Qayyim said:

"These are well known cases which have been accurately reported. Those who claim that financial punishment was abrogated are wrong. Their views may be refuted by the cases ascribed to great companions of the Prophet (S.A.W.). Neither the Quran nor the Sunnah can help them in supporting their claim, nor is there any consensus about it. Even if there was a consensus, it would have no power to abrogate the Sunnah. The only thing they may say is: 'in our school's view it is not allowed.' This means they take their own view as standard of what is accepted and what is not."[23]

The penalty of fine is also accepted as a mode of punishment by the Hanbali, Hanafi and Maliki schools. The commentators of these schools defend it mainly in ibn al-Qayyim who holds the view, that both elements of financial punishment (i.e. fine and seizure of property), are allowed under Islamic penal system. In some cases the Prophet (S.A.W.) determined the amount of fine e.g. in cases of theft in which the value of stolen property did not reach the minimum nisab required for impositions of hadd punishment, refusing payment of Zakat etc. In other cases it was left to the discretion of Ruler or Qadi to fix the amount according to gravity of the offence and capability of the offender to pay. According to Islamic criminal law it is not correct to imprison an offender who is unable to pay fine. He can only be imprisoned when he is capable of paying the amount of fine but fails to do so. The failure to pay debt is punishable only when the debtor has the means to pay. But if he has no capacity to pay, he cannot be incarcerated because the cause for incarceration is not present.

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[22] Ibn Taimiyya al-Hisba fil Islam p.43; Ibn al-Qayyum al-Turuq al-Hukmiyya pp.286-290.
[23] Ibn al-Qayyim, al-Turuk al-Hukkuriyya pp. 287-288.

However, there is no prohibition under Islamic law to make the offender to work and pay the amount of fine out of the wages earned by him[24].

6.6.2 Public Disclosure (Tashhir)

Islamic criminal law also recognises Public disclosure or Tashhir as a penal punishment. By this punishment the offence committed by the accused is announced. The Prophet (S.A.W.) used this punishment on a man who after collecting alms (Zakat), gave some to the Prophet (S.A.W.) and the rest he took himself claiming that it had been given to him as a gift[25]. He was awarded with the punishment of public disclosure.

The use of this punishment is supported by various Muslim judges. Shurahyh, a well known judge during the time of the caliph Umar and caliph Ali stated that a false witness must be publicly identified so that the people may not trust him[26]. All the schools agree on this statement of the great judge. In this punishment the offender was taken round every corner of the city by the Court officials for the purpose of telling the city dwellers that for the commission of an offence he has been awarded *ta'zir* punishment. The object of this punishment was to draw the attention of the people to the fact that this offender should not be trusted.

In the earliest times public disclosure was made in public places and markets. But nowadays it may be done by publishing announcements in newspapers, radio, television or by distributing handbooks.

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[24] See Oudah Vol. 3 p. 109.
[25] Mishkat al Masabih, Vol. 1. P. 560.
[26] Sarakshi, Mabsut Vol. 16 p. 145.

Public disclosure or tashhir can be a good substitute for offenders liable to offences punishable with short term imprisonment.

6.6.3 Threat (al-Tahdid)

Threat is a form of *ta'zir* punishment which serves the aim of punishment by putting the offender under fear of punishment. It is carried out by either giving threat to the offender of punishment if he repeated the offence or the execution of sentence is delayed until the offender has committed another offence (within a stated period).

The admonition of the offender is regarded as punishment effective enough in the reformation of the offender. This punishment for *ta'zir* offences is similar to the modern punishment of suspended sentence[27]. However, there is marked difference between Shariah and modern form of suspended sentence. In Shariah the period of suspended sentence is not fixed. It is left entirely at the discretion of the judge to fix the period of suspended sentence. Furthermore, under modern law the Courts cannot suspend a sentence other than a sentence of imprisonment[28] while under Islamic law the judge has the authority to suspend any sentence including imprisonment.

6.6.4 Warning or Admonition (al Waz)

The Shariah prescribes warning as a form of punishment. It is more or less similar to admonition. The purpose of admonition is to caution or remind the offender of his criminal activities. It is mentioned in the Quran as the first stage in

[27] Section 39 of the English Criminal Justice Act 1967 allows the Court which passes a sentence of imprisonment for a term of not more than two years may suspend the sentence for a specified period. This period may not be less than one year and not more than three years.
[28] The sentence of the Court, A Handbook for Courts on the Treatment of the Offender, London, H.M.S.O. (1979).

dealing with wives who are disobedient. The Holy Quran says: "As to those women on whose part you fear disloyalty and ill conduct, admonish them" (Surah an-Nisa (4) :34).

This punishment is given when the Court feels that the punishment meted out to the offender will cause the offender to mend his ways. The modern penal system also prescribes for the punishment of warning or admonition. This is used in the cases of first offenders and offences of less serious nature.

Under the modern penal system punishment of warning or admonition is enforced differently in various legal systems. Under some legal systems the sentence is pronounced and only its execution is postponed for sometime in order to give an opportunity to the offender to reform. If the offender re-offends again, the sentence is to be executed. While in some other legal systems the Courts defer the imposition as well as the execution of sentence and provide an opportunity to the offender for reformation.

This system is known as probation and is successfully practised in most parts of the world including India and Malaysia[29]. It is to be noted that warning or admonition are of recent origin under the modern penal system being applied as late as the end of the 19th century and the beginning of the 20th century whereas the Shariah used them thirteen centuries ago[30].

[29] See Chapter 4.
[30] Qudah op. cit. Vol. 3 p. 106.

6.6.5 Boycott (al-Hajr)

Islamic law recognises boycott as one of the *ta'zir* punishments. The Quran supports the use of this punishment. Recommending this punishment, the Holy Quran says "Admonish them and refuse to share their beds" (Surah an-Nisa (4) :34). The Prophet (S.A.W) is said to have used this punishment in the case of his three companions who failed to join the army in the battle of Tabuk[31]. They were punished by the Prophet (S.A.W.) by severance all relations with them. The social boycott proved successful and reformative. This method dealing with the offenders can be used when the offender cannot be dealt with by any other method of punishment[32]. Modern form of boycott can be traced into the system of "ex-communication" practised among certain communities. An order of ex-communication for a short period could be a good alternative to short-term imprisonment.

6.7 HUMANISM IN ISLAMIC PENAL SYSTEM

In Islam it is believed that there is no criminal who cannot be cured. Even the worst criminal can be reclaimed. He can repent and can be forgiven. Islamic law not only leaves the door open for repentance but it also strives to cure the criminal's moral life.

Social defence in the sense of rehabilitation and treatment of the offender by eradicating of crime has its origin in Islamic Penal system. Islamic Penal law urged on

[31] Ibn Tamiyyah, al-Siyasa al-Shamiah, Cairo (1951) pp. 120-121.
[32] Ibid 53.

prevention of crime before its commission and this can be achieved by adopting the following measures[33]

(i) People should be guided to have faith in religion and protect themselves from going astray.

(ii) Generate love of doing good to the people.

(iii) Doing good to the people in the society and avoiding evil.

Islamic law also prohibits the disclosure of crime so that moral scandals may not widely spread and the offender does not continue with his crimes.

People are also encouraged to pardon offenders. Due consideration is given to promote mutual aid and co-operation in financial and moral affairs with a view to provide a prosperous life to everyone. Islamic penal law does recognise what is known in contemporary criminological terminology as "individualisation of punishment". It calls upon the judge to consider the circumstances of the criminal that were instrumental in the commission of the crime.

Thereafter the steps are taken by the judge to rehabilitate or reform the offender. Punishment is awarded in proportion to the harm done and in relation to the criminal's circumstances. The harsh punishment is substituted with lighter one. He may receive medical or psychiatric treatment or moral edification. Islamic law does not prohibit any procedure leading to the disclosure of the criminal's circumstances either through medical investigation or social enquiry.

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[33] Hassan EL Sa'aty, "Islamic Criminal Justice System in Legislation and Application", *Resource Material* UNAFEI (1989) p. 230, Fuchu, Tokyo, Japan.

6.8 CONCLUSION

The object of punishment under Islamic Penal system is to eradicate crime from the society. To attain this object various punishments have been provided. These punishments are imposed in accordance with the nature of injury suffered by the society in order to protect humanity from evil and attain peace and security for them. The punishments in Islamic penal system are clearly and strictly prescribed and no room for discrimination and arbitrariness is left to the Courts. The punishments in Islamic criminal law are fixed for limited number of offences which fall in the category of *Hadd* and *Qisas*, while punishments for a large number of offences fall under *ta'zir* or Penal punishments which give full discretion regarding the measure and form of punishment. *Ta'zir* punishments are many and vary between lighter to more severe punishments. It may range from capital punishment to caning, imprisonment to warning, exile to public disclosure and boycott. The Holy Quran and practices of the Prophet (S.A.W.) support these punishments. The Holy Quran says:
"Nor do evil in the land, working mischief" (Surah ash-Shu'raa (26) :183)

The Ruler of the country has absolute discretion to impose these punishments and make rules for the enforcement of these punishments. In the earlier chapters, we have observed that of all the forms of punishment, imprisonment is one of the most widely used form of punishment. The Islamic penal system, although it recognises the role of imprisonment in crime prevention, however discourages its use due to the evils inherent in imprisonment. The imprisonment is to be imposed only in the circumstances when it is not possible to deal with the offender by any other form of *ta'zir* punishment. Islamic penal law provides a wide range of punishment in the category of *ta'zir*. These punishments are both deterrent and reformative in nature and

are also easier to administer. It is submitted that due to the inherent evils involved in imprisonment and particularly in short term imprisonment, some of the *ta'zir* or penal punishment can be helpful in dealing with the problem of petty offenders.

CHAPTER SEVEN

CONCLUSION AND SUGGESTIONS

Imprisonment is one of the important and extensively used form of punishment throughout the world in most of the countries including India and Malaysia. A large number of the offences under the Penal Codes and other laws of India and Malaysia are punishable with imprisonment. Its use is supposed to achieve various objectives of punishment such as deterrence, retribution, reformation and rehabilitation of the offender. It is said to be the only punishment, which provides the opportunity to the prison authorities to use corrective and rehabilitative measures. However studies indicate that imprisonment does not seem to have any deterrent, or reformative effect on first offenders and short-termers rather it sends them back to society well trained in the art of crime within a short span of time.

The confinement in the company of recidivists and experienced people of the underworld provide the new inmates an opportunity to learn and acquire ideas and techniques which often lead them to adopt criminal activities. Imprisonment has been found to have a brutalising effect on the personality of the offender and to cause mental anguish and deterioration to their physical health.

Most of the prisons in India and Malaysia are overcrowded. It has been observed that those who are confined in overcrowded prisons have re-conviction rate much higher than those who are detained in less crowded prisons. The majority of the prison population consists of short-termers who are sent to prison for a short duration in the already overcrowded prisons. In this short span of time, they get the opportunity

of mixing with professional and habitual offenders who transmit the criminal traits to these short-termers.

In India imprisonment is of two descriptions: rigorous and simple. However, no such division is made in Malaysia. In rigorous imprisonment, prisoners are engaged in hard labour. They are employed to work in the prison farm and prison industries. In simple imprisonment no work or light work is taken from the prisoners. They remain idle in the prison. It is to be noted that those who are awarded simple imprisonment are short-termers. Such short-term of sentence does not have any deterrent effect on them. Rather they become an unnecessary burden on the prisons. The presence of short-termers sentenced to simple imprisonment hampers the rehabilitative and correctional work in prisons. The ill-effects of short-term imprisonment on the first offenders who have not committed serious offences are clear. They are subjected to humiliation and all types of vices. It also effects the confined persons' productivity and maintenance of his dependants.

The cost of keeping an offender is also exorbitant. It is estimated that the cost of keeping an offender in prison is more than twenty times than releasing him on probation or making a community service order. Short-term imprisonment is therefore not cost effective. The cost of maintaining a prisoner is very high, a major chunk of public funds is used in maintaining prisons. The expenses of their maintenance can be curtailed if the prison population is reduced by avoiding prison sentences particularly for those who have committed minor offences punishable with short-term imprisonment. This would result in restrictions on the number of offenders

incarcerated and would provide an opportunity to the prison authorities to apply rehabilitative and reformative measures to the fullest extent on the prisoners.

Short-term imprisonment is a source of overcrowding in prison. As discussed earlier, overcrowding in prisons makes it difficult to the prison regime to implement effectively corrective measures. It is a thorny problem faced by the correctional administrators globally. However, the solution to the problem is not easy. It needs an integrated approach by the criminal justice administration, the police, the prosecution and the judiciary to reduce pressure on the overcrowded and under facilitated prisons and other penal institutions.

In India the total capacity in prisons is only for 167, 326 prisoners, but the number of prisoners confined is much more. For example, Delhi's Tihar jail has the capacity to confine 3000 prisoners but there are more than 9000 prisoners[1]. Similarly in Malaysia, some of the prisons originally built to accommodate 200-600 prisoners now are confining 2000-4000 prisoners[2].

Overcrowding in penal institutions causes various adverse effects. It creates unhealthy atmosphere, hampers penal reformation, results in pressure on prison staff and contributes tension between staff and inmates.

The problem of short-termers in India is a serious one. The statistics of the past fifty years reveal that the Courts have awarded short-term imprisonment to a

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[1] M.S. Rahi, "Judicial Overview of Prisons in India", *Criminal law Journal* (1997) p. 47. Also see "*Prisons in India*" 1992-1993.

[2] H.J.Shardin bin Chik Lah, "Practical Measures to alleviate the Problem of overcrowding" *Resource Material* No. 6, UNAFEI (1985) p. 235.

large body of offenders. For example, in the year 1941, it was found that 66% offenders were awarded up to six months imprisonment. In the year 1951 this number rose by 81% and in 1961, 87% of offenders were imposed up to six months imprisonment[3]. The situation in India has become worse in the later years. Another study revealed that short-term sentences range between 85% to 95%[4].

In Malaysia the situation is not much different from that of India. In the year 1993, the number of offenders serving less than six months were 47%. During 1994, the offenders serving less than six months imprisonment rose up to 51.4%. Similarly during 1995, 46% offenders were awarded less than six months imprisonment[5].

The prison records of India and Malaysia show that quite a large number of offenders serving in prisons constitute short-termers who are undergoing even less than six months imprisonment. Instead of confining such offenders who have committed minor offences punishable with short-term imprisonment they can be dealt with non-custodial methods of treatment.

A number of studies to determine the effects of short-term imprisonment reveal that a prison sentence is not likely to be useful unless it provides more than six months for training education and treatment[6]. The German criminologists are also against awarding of short-term imprisonment. In some parts of Germany as an

[3] E.N.Sabhahit, *Sentencing by Courts in India* Banglore, Dixit Publications (1975) p. 270.
[4] M. Zakaria Siddiqui, "The Prison as a Correction Agency", *Social Defence*, New Delhi, Government of India Publications (1976), p. 28.
[5] See Annual Reports of 1993, 1994 and 1995 Prisons Department of Malaysia, Kuala Lumpur.
[6] Manheim, *Group Problems in Crime and Punishment* (1955) cited in Wolf Middenroff The Effectiveness of Punishment, South Hackensack, Fred B. Rothman Co., p. 86.

alternative to short-term imprisonment, a person convicted to such punishment is permitted to serve some period of prison sentence in stages on the weekends[7].

Similar to the German experience in order to avoid confining first offenders of minor offences, the government of Malaysia as far back as 40 years ago enacted the Compulsory Attendance Ordinance 1954. Under this enactment two attendance centres were established in Kuala Lumpur and Penang. Under this system the first offenders involved in minor offences and sentenced to not more than three months imprisonment were committed to the attendance centres for not more than three hours daily after their usual working hours to report daily five days a week from 5 pm to 8 pm[8].

These centres functioned well in Malaysia for some years but for the last two decades they were not in use and they have just disappeared. However, both the Compulsory Attendance Ordinance 1954 and the Compulsory Attendance Rules have not been repealed, and it is submitted that the Compulsory Attendance Ordinance 1954 should be revived to apply to first offenders and minor offenders. It is also submitted that as in India no legislation exists for the establishment of attendance centres, a law on the lines of Malaysian Attendance Centre Ordinance may be enacted to reduce the pressure on prisons and to save the short termers from the ill-effects of prisons.

Absolute and conditional discharge may be employed as a measure to avoid short-term imprisonment. Section 173A and 294 of the Malaysian Criminal Procedure

[7] Id. pp.310-311
[8] Supra note 2 at p.237.

Code empowers the Courts to release the offender on absolute and conditional discharge.

The corresponding Indian provision for the absolute or conditional discharge and binding over are contained in Section 360 and 361 of the Indian Code of Criminal Procedure and Section 3 and 4 of the Probation of the Offenders Act, 1958. A comparative analysis of the Indian and Malaysian provisions with regard to absolute and conditional discharge shows that in India, if the court fails to release the offender on absolute and conditional discharge when the conditions mentioned in Section 360 are found, the Court not acting under this provision, has to record special reasons. The special reasons to be recorded must be of such a nature as to compel the Court to decide that it is impossible to reform or rehabilitate the offender. Such a finding has to be arrived at looking at the age, character and antecedents of the offender[9]. Furthermore, the omission to record special reasons is an irregularity and on revision or appeal the sentence passed by the lower court may be set aside if the irregularity has caused any miscarriage of justice. In India, these statutory provisions have helped the courts to restrict the imposition of short term imprisonment so as to protect petty offenders from the contaminated atmosphere of prison life. No such obligation is imposed under the Malaysian provisions dealing with absolute or conditional discharge and binding over. It is submitted that in Malaysia, if such a provision is made mandatory, to give reasons for not applying this provision to release the offenders, this will protect many petty offenders from ill-effects of prison life.

[9] See *Dilbagh Singh v. State of Punjab* (1979) S.L.C. (Cr.) 376.

The case law on the subject of absolute or conditional and binding over show that Courts in India and Malaysia have used these provisions for certain categories of offenders. It is submitted that there is need to use this provision more liberally in the case of the offenders whose crimes are not so serious so as to pose any danger to the society.

One of the important and the most effective non-custodial measures is probation. Probation is a form of treatment of offender outside the four walls of the prisons. It is the outcome of a feeling that a majority of offenders need sincere advice and help from the fellow human beings for strengthening their moral fibre. A great advantage of probation is that it saves the first and youthful offenders from the stigma of prison life and the contaminated environment of prison. A comparative analysis of the custodial and non-custodial measures of punishment reveal that probation is the most cost effective method of treatment of offenders.

In Malaysia the law relating to probation is contained in the Juvenile Courts Act and Criminal Procedure Code. The provisions of the above statutes in dealing with probation appear to be adequate. However, the cases in which these provisions were invoked reveal that the Courts have used these provisions in granting probation in the case of juvenile and youthful offenders. It is sparingly used in the cases of adults (those who are of the age of 21 or above). The data used in this work reveal that more adults than juveniles who were granted probation successfully completed their probation period. However it is disheartening to note that the courts rarely grant probation to adult offenders. One of the obvious reasons appears to be the lack of probation services for adult offenders. There is a need for a well developed service for

adult offenders in Malaysia. It may not be difficult to introduce probation service for adult offenders as the Department of Social Welfare provides probation services for juveniles and youthful offenders. It has a well-knit scheme for this class of persons with a force of 300 probation officers[10].

In Malaysia no comprehensive legislation exists for probation system while in India such services are made available through the central legislation and by the respective states. It is to be noted that in Singapore, the Probation of Offenders Act 1957 has been in use for the grant of probation to juvenile as well as adult offenders. In Singapore the probation system has worked well. It is submitted that a comprehensive legislation introducing probation system for adult offenders in Malaysia is needed so as to reduce the pressure on prisons and to avoid short-termers lurking unnecessarily in jails.

In India the law relating to probation is contained in the Code of Criminal Procedure and in various state enactments and the Central legislation the Probation of Offenders Act, 1958. These enactments offer an alternative to the Courts to release first offenders or minor offenders on probation. The Probation of Offenders Act 1958 is a comprehensive central legislation which has been adopted by most of the states in India. To ensure that the offender released on probation conducts himself properly and does not reengage in criminal activities, the Act enables the court to pass a supervision order directing the offender to remain under the supervision of probation officer named in the order during the period of not less than one year and not more than three years. No such provision exists under the Malaysian Criminal Procedure

[10] Information obtained in the interview with Chief Probation Officer, Department of Social Welfare, Kuala Lumpur, Malaysia.

Code for the supervision of the offender by probation officers. In India, the court passing the probation order may impose certain conditions to be observed by the probationer. In case of violation of conditions, the Court may revoke probation. The probation officer is always available to the probationer to guide him. In Malaysia in the absence of supervision by probation officer, the courts appear to be reluctant to make probation orders.

With a view to making the probation service more effective and also reducing the risk of release of undeserving offenders, it is suggested that the courts should insist upon receiving full information in the nature of a pre-sentence report, provided under the Indian laws dealing with probation. This report is prepared by a probation officer and contains the social background and other relevant information to help the court in arriving at the appropriate decision. The Indian law provides for such reports but the Malaysian law is lacking in this respect.

Another procedure adopted to secure antecedent social background and other information in the system of sentence hearing in India is provided in Section 235(2) of the Indian Code of Criminal Procedure which requires the court to hear the accused on question of sentence before passing sentence. The object of this provision is for the court to acquaint itself with the personal information of the offender and thereby enable the court to decide as to the proper sentence or any other method of disposing the case of the offender after his conviction. In Malaysia, this can be achieved with the help of the social welfare department. The probation officers working under the department may help the court to provide such pre-sentence reports. In India, it is done by the probation officers working under the probation department. It is therefore

submitted that in Malaysia provision should be made in the law to make pre-sentence reports essential for granting probation.

As we have seen earlier both Malaysia and India are facing the problem of overcrowding in jails due to the alarmingly large number of short-term prisoners thus making it difficult the use of modern correctional techniques. This problem can be overcome by fully implementing the probation services in Malaysia and India. In India, it has been observed that the courts very often release an offender on probation without supervision by probation officer. This practice is against the philosophy of the probation system. A probationer requires guidance during his probation period. In the absence of appropriate supervision there is a possibility of his relapsing into criminal career. It is desirable that the courts before releasing an offender should insist that there is a provision of a probation officer to look after the probationer. It is further submitted that there should be a provision to release the probationer earlier if he behaves well and to increase the probation period if the circumstances of the case so require.

Fine is one of the important alternatives to short-term imprisonment. Unfortunately a large number of offenders who are unable to pay fine, are sent to prison to serve short-term sentences. The importance of fine as an alternative to short-term imprisonment was felt as far back as in 1951 at the Hague conference of the United Nations on Crime Prevention and Treatment of Offenders. After considering the social and economic drawbacks of imprisonment it was suggested by the conference that as a substitute of short term imprisonment, a fine should be

imposed[11]. The Indian Jails committee of 1919-20 also recommended the use of fine as an alternative to short-term imprisonment[12].

Fine can be a good substitute for short-term sentences if some additional steps are taken. To improve its effectiveness it is suggested that fine should be imposed in accordance with the ability of the offender to pay fine. The amount of fine should be within the accused's means to pay though he should be made to feel the pinch of it.

Another area that needs attention is imprisonment in default of fine. Many offenders are committed to prison on their failure to pay fine. The failure to pay may be due to inability to pay or unwillingness of the offender. Default in payment may result in commitment to prison. Though circumstances of the case may not require imprisonment, nevertheless it is imposed on him. Section 64 of the Indian Penal Code and Section 283(1)(b)(4) of the Malaysian Criminal Procedure Code empowers the court to impose sentence of imprisonment in default of payment of fine in the cases wherein the sentence of fine is prescribed as a penalty. The use of these provisions creates problems for those who are unable to pay fine due to genuine reasons.

It should be noted that the Section 424(10(a) of the Indian Code of Criminal Procedure and Section 283(10(b) of the Malaysian Criminal Procedure Code confer powers on the courts to allow payment of fine by instalment where default is made by the offender in payment of fine. It is submitted that if in deserving cases the courts of both countries liberally used these provisions, a large number of short-termers may be protected from the ill-effects of prison life where they are unable to pay fine.

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[11] Chabra K.S., *Quantum of Punishment in Criminal Law in India*, Chandigarh, Publications Bureau Punjab University p. 75.
[12] Id at p. 203.

In recent years the emphasis has been laid on community based sanctions as an alternative to short-term imprisonment. The main reason advanced for such non-custodial measure is that it is less costly and more effective and humane than imprisonment. It keeps away the offender from the polluted atmosphere of prison life. In Malaysia[13] and India[14] there is no law governing the rules of community services, however the governments of both countries are contemplating to introduce community services. In India the Indian Penal Code (Amendment) Bill, 1972, which contained provisions for the introduction of community service order, was presented before the Rajya Sabha (the Upper House of Indian Parliament) which passed the Bill in 1978. Nevertheless, it could not be taken up by the Lok Sabha and with the prorogation of the Parliament, the Bill lapsed. Since then successive governments in India did not care to put the Bill on legislative lists. Section 74A of the Amendment Bill 1972, empowers the court to make community service orders in the cases of persons above 18 years of age who are convicted of an offence punishable with imprisonment not exceeding three years or with fine or both requiring him to perform without remuneration some kind of work for such number of hours as may be specified in the order. It is submitted that it is timely to consider the implementation of the community service order in view of the problem of short-term imprisonment. The community service orders have worked well in the United Kingdom. It is submitted that looking at the success of the United Kingdom Community Service orders these can work well in India and Malaysia as an alternative to short-term imprisonment.

[13] Datuk Syed Hamid Albar, the Malaysian Law Minister, decalred that the cabinet agreed in principle to accept his ministry's recommendation to implement alternatives to sentencing such as suspended sentence, plea bargaining and community services, etc. See New Straits Times, 9 October 1992.

[14] Mr Ramakanth Khalap, Indian Minister of Law and Justice, while visiting Malaysia on 3 September 1997 at Rennaisance Hotel, Kuala Lumpur announced in the gathering of Indian Professors of Law that the Government of India is considering to introduce community service as a penalty.

Attendance centres can also be an effective tool to overcome the problem of short-termers. Unfortunately these centres are no more working in Malaysia. These centres are working successfully in the United Kingdom. It is submitted that in Malaysia these centres be revived so that the courts may have the option of using them in the cases of those offenders who have committed offences punishable with short-term imprisonment. In India no legislation exists as to the use of attendance centres. It is submitted that in India provisions be made on the lines of Criminal Justice Act 1982 to give judicial sanction to this mode of punishment.

Mitigating factors also play an important role in the sentencing process. Some of the mitigating factors which the courts consider in sentencing process are age of the offender, his record, good character, circumstances resulting in the commission of the offence, plea of guilty, health of the offender, effect of sentence on family and behaviour subsequent to the commission of the offence. These mitigating factors help the court to impose appropriate sentence in cases punishable with short term imprisonment.

Mitigation may influence the court in many ways. It may reduce the punishment as when the offender is sentenced to short-term sentence or it may persuade the court to award non-custodial measure of punishment such as conditional discharge, probation and other community based sanctions.

In India although no specific law exists requiring the courts to consider mitigating factor Section 360 of the Indian Code of Criminal Procedure and Section 3

and 4 of the Probation of Offenders Act 1958 mention some mitigating factors such as age, character and antecedents of the offenders. The Court may take these factors into consideration when releasing an offender after admonition and/or probation of good conduct. In Malaysia statutory recognition has been accorded to mitigating factors. The plea in mitigation may be considered by the trial court where it is shown that there is a good case for such a plea. Section 176(2)(8) of the Criminal Procedure Code provides that particulars to be incorporated in the record shall include the court's note on previous convictions, evidence of character and plea in mitigation. Section 173A and 294 of the Criminal Procedure Code and Section 12 and 13 of the Juvenile Court Act 1947, state the mitigating factors. A comparative analysis of the Indian law and Malaysian law dealing with mitigating factors reveal that the Malaysian law is more explicit and comprehensive than the Indian law. The study of the cases in which plea in mitigation is made also show that in Malaysia it is a normal practice after the accused is found guilty before sentence to place before the sentencing court mitigating factors. These mitigating factors if effectively pursued may influence the court to avoid short-term sentences and apply other non-custodial measures. The system of sentence hearing that exists in India provides an opportunity to put before the court, mitigating factors for the court's consideration. But this procedure is absent in summons trials in which most of the minor offences are dealt with and in which short-term sentences are mostly imposed. It is submitted that in India statutory provisions should be made for the consideration of mitigating factors by the courts particularly for those punishable with short-term sentence.

The Islamic penal system provides a wide range of alternatives to combat the problem of short-term imprisonment. The alternatives are contained in ta'zir or penal

punishment. The offences for which ta'zir or penal punishment are prescribed are not specifically mentioned in the Holy Quran or Sunnah of the Prophet (SAW). The legislator or Ruler has been given a discretion to prescribe punishment in accordance with the need to reform the criminal Imprisonment is one of the penalties prescribed by Islamic criminal law. Nevertheless, the evils of imprisonment were felt by the jurists of Islamic Criminal law. They did not favour the use of imprisonment rather they discouraged its use by providing various non-custodial measures. The experience of the countries where the Islamic penal system is in force is that the prison population is comparatively low whereas in India and Malaysia, the number of prisoners is very high.

The reason for such a low number of the offenders is that the Islamic penal law prescribes a variety of non-custodial measures of punishment. The courts are free to select any of these in accordance with the nature of crime and the need of the offender. The courts are encouraged to use these methods instead of imprisonment. Unlike modern penal system, Islamic penal system, requires the courts to consider imprisonment as a secondary punishment and to impose it only when non-custodial measures cannot be applied.

Besides imprisonment, fine is also one of the penal punishments prescribed under the Islamic penal system. The amount of fine is fixed according to the gravity of the offence and the capability of the offender to pay. Under the Islamic penal system it is wrong to imprison an offender due to his failure to pay when he is unable to pay the fine. He can be imprisoned only when he has the means to pay but fails to

do so. Islamic law also allows the offender to work and to pay the amount of fine out of wages earned by him.

The Islamic penal system prescribes public disclosure or tashhir as a penal punishment. Under this punishment, the offence committed by the accused is made public by announcement. It may be done through the media in newspapers, radio, television or by distributing leaflets. This can also be a good substitute for offences punishable with short-term imprisonment.

Threat or al-Tahdid is another form of penal punishment which can be a substitute for short-term sentences. This is similar to the modern form of suspended sentence. However, the Islamic concept of suspended sentence is different from modern form of suspended sentence. Under the Islamic penal system the period of suspended sentence is not fixed. It is left to the discretion of Qadi or Judge to fix the period of suspended sentence. However, under the modern penal system, the courts cannot suspend sentence other than sentence of imprisonment, but under the Islamic law judge is empowered to suspend any sentence including sentence of imprisonment.

Warning or admonition is another penal punishment provided by Islamic penal system. This punishment is akin to the modern form of probation. This has been regarded as one of the most successful and viable alternatives to short-term imprisonment. It is to be noted that probation was used as an alternative to imprisonment as late as the end of 19^{th} century while Islam advocated it thirteen centuries ago.

Boycott or al-Hajr is one of the punishments used under Islamic penal law. This punishment is the same as ex-communication practised in certain communities. An order of ex-communication may be a good substitute for short-term imprisonment.

The Islamic penal law prescribes a variety of punishments to deal with the offenders which are not found under modern penal system. It is believed that even a bad criminal can be rehabilitated and reclaimed. Punishment is imposed in accordance to the nature of the offence and in proportion to the harm done by the offender. The harsh punishment may be substituted with a lighter one with the avowed object of reforming the offender. Islamic law allows all those measures to be taken that can protect the society and reform the offender.

The Islamic objective of punishment is both deterrent and reformative in nature. It gives a discretion to the judge to select the most appropriate punishment that is suitable to the needs of the offender and provides a wide range of alternatives to short-term imprisonment. It is submitted that some of the penal or ta'zir punishments may be seriously considered to combat the problems of short-termers in our countries.

Last but not the least, it may be said that short-term sentence of imprisonment neither serves the interest of the society nor that of the offender. The sooner it is replaced, the better it will be.

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APPENDIX

TABLE A-1 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
109-120 = Offences of Abetment	2	2	1	0	0	0	0	0	0	0	5
120A-120B = Offences of Criminal Conspiracy	0	0	0	0	0	0	0	0	0	0	0
121-130 = Offences against the State	0	0	0	0	0	0	0	0	0	0	0
131-140 = Offences relating to the Armed Forces	0	0	0	0	0	0	0	0	0	0	0
143-160 = Offences against the Public Tranquillity	14	9	0	0	0	0	0	0	0	0	23
161-171 = Offences by/relating to Public Servants	17	19	0	0	0	0	0	0	0	0	36
172-190 = Contempts of the Lawful Authority of Public Servants	12	3	0	0	0	0	0	0	0	0	15
193-229 = False evidence and offence against Public Justice	8	21	1	0	0	0	0	0	0	0	30
231-263 = Offences relating to Coin and Government stamps	2	2	3	0	0	0	0	0	0	0	7
264-267 = Offences relating to Weights/Measures	0	0	0	0	0	0	0	0	0	0	0
269-294 = Offences affecting the Public Health/ Safety/ Convenience/ Decency/ Morals	6	2	0	0	0	0	0	0	0	0	8
295-298 = Offences relating to religion	15	38	0	0	0	0	0	0	0	0	53
302 = Murder	0	0	0	2	0	0	0	0	7	7	16
304 = Culpable homicide not amounting to murder	4	2	21	56	40	13	0	0	4	0	140
304A = Causing death by rash or negligent act	4	1	0	0	3	0	0	0	0	0	8
305 = Abetment of suicide committed by a child/ insane or delirious person/ an idiot/ a person intoxicated	0	0	0	0	0	0	0	0	0	0	0
306 = Abetting the commission of suicide	0	0	0	0	0	0	0	0	0	0	0
307 = Attempt to murder	0	1	2	0	1	0	0	0	0	0	4
308 = Attempt to commit culpable homicide	0	2	0	0	0	0	0	0	0	0	2
309 = Attempt to commit suicide	0	0	0	0	0	0	0	0	0	0	0
312-318 = Offences of the causing of miscarriage; of injuries to unborn children; of the exposure of infants; and of the concealment of births	0	1	0	0	0	0	0	0	0	0	1
323-338 = Offences relating to voluntarily causing hurt or grievous hurt	80	128	30	4	3	0	0	0	0	0	245
341-348 = Offences of wrongful restraint and wrongful confinement	0	2	1	0	0	0	0	0	0	0	3
352-358 = Offences of criminal force and assault	24	57	8	0	0	0	0	0	0	0	89
363-369 = Offences of kidnapping or abduction	0	4	1	0	0	0	0	0	0	0	5
370-374 = Offences of slavery and forced labour	1	5	0	0	0	0	0	0	0	0	6
376 = Rape	0	6	35	47	36	16	0	0	0	0	140
377 = Unnatural offence	1	6	5	0	0	0	0	0	0	0	12
377A = Outrage on decency	0	0	2	0	0	0	0	0	0	0	2
379 = Theft	254	1303	184	8	4	0	0	0	0	0	1753
380 = Theft in a building/ tent/ vessel	318	599	121	0	0	0	0	0	0	0	1038
381-382 = Other types of theft	36	84	9	2	0	0	0	0	0	0	131
384-389 = Various offences of extortion	2	27	13	0	0	0	0	0	0	0	42
392 = Robbery	20	155	97	16	5	0	0	0	0	0	293
393 = Attempt to commit robbery	2	11	4	2	0	0	0	0	0	0	19

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
394 = Robbery with causing hurt	1	8	23	12	15	1	0	0	0	0	60
395 = Gang robbery	1	7	20	12	2	0	0	0	0	0	42
396 = Gang robbery with murder	0	1	2	1	0	0	0	0	0	0	4
397 = Robbery with arms or with attempt to cause death or grievous hurt	4	7	16	6	3	0	0	0	0	0	36
399-402 = Conspiracy to commit gang robbery	0	0	0	0	0	0	0	0	0	0	0
403-404 = Offences of criminal misappropriation of property	8	10	2	0	0	0	0	0	0	0	20
406-409 = offences of criminal breach of trust	12	42	8	0	0	0	0	0	0	0	62
411-414 = Offences of the receiving of stolen property	74	462	50	0	0	0	0	0	0	0	586
417-420 = Offences of cheating	10	89	14	0	0	0	0	0	0	0	113
421-424 = Offences of fraudulent deeds and disposition of property	0	11	2	0	0	0	0	0	0	0	13
426-440 = Offences of committing mischief	12	12	2	0	1	0	0	0	0	0	27
447-462 = Offences of criminal trespass	113	752	140	11	2	0	0	0	0	0	1018
465-489D = Offences of forgery relating to documents and to currency notes and bank notes	4	19	8	0	0	0	0	0	0	0	31
491 = Criminal breach of contracts of service	0	0	0	0	0	0	0	0	0	0	0
493-498 = Offences relating to marriage	0	0	0	0	0	0	0	0	0	0	0
500-502 = Offences of defamation	0	0	0	0	0	0	0	0	0	0	0
504-510 = Offences of criminal intimidation, insult and annoyance	11	31	0	0	0	0	0	0	0	0	42
511 = Attempt to commit offences	3	9	0	0	0	0	0	0	0	0	12
TOTAL	1075	3950	826	179	115	30	0	0	11	7	6913

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TABLE A-2 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

FIREARMS (INCREASED PENALTIES) ACT, 1971	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3 = Discharging a firearm in the commission of a scheduled offence	0	1	0	0	0	0	0	0	0	1	2
Sec. 3A = Being an accomplice in case of discharge of firearm	0	0	0	0	0	0	0	0	0	0	0
Sec. 4 = Exhibiting a firearm in the commission of a scheduled offence	0	0	1	2	0	0	0	0	0	0	3
Sec. 5 = Having a firearm in the commission of a scheduled offence	0	0	0	0	0	0	1	3	0	0	4
Sec. 6 = Exhibiting an imitation firearm in the commission of a scheduled offence	7	2	0	2	0	0	0	0	0	0	11
Sec. 7 = Trafficking in firearms	0	0	0	0	0	0	0	0	0	0	0
Sec. 8 = Unlawful possession of firearms	8	15	10	22	6	0	0	0	0	0	61
Sec. 9 = Consorting with persons carrying arms	0	1	1	3	1	0	0	0	0	0	6
TOTAL	15	19	12	29	7	0	1	3	0	1	87

TABLE A-3 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

DANGEROUS DRUGS ACT, 1952 (REVISED 1980)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 6 = Possession of raw opium/ coca leaves/ poppy-straws/ cannabis	140	386	58	7	1	0	0	0	0	0	592
Sec. 6B(1)(a) = Planting or cultivation of any plant from which	0	0	1	0	0	0	2	0	0	0	3
6B(1)(b) = raw opium/ coca leaves/	0	0	0	0	0	0	0	0	0	0	0
6B(1)(c) = poppy/ straw/ cannabis may be obtained	0	0	1	0	0	0	0	0	0	0	1
Sec. 9(a) = Possession of/ import into or export	6	24	8	0	0	0	0	0	0	0	38
9(b) = from Malaysia/ manufacture, sell	1	2	0	0	0	0	0	0	0	0	3
9(c) = or otherwise deal in any prepared opium	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(1)(a) = Use of premises, possession of utensils	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(1)(b) = and consumption of opium	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(2)(a)	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(2)(b)	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(1)(a) = Import into or export from Malaysia	0	1	0	0	0	0	0	0	0	0	1
Sec. 12(1)(b) = and dangerous drug	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(2)/(3) = Possession of any dangerous drug	397	3481	642	12	0	1	0	0	0	0	4533
Sec. 13(a) = Keeping or using premises for	0	0	0	0	0	0	0	0	0	0	0
Sec. 13(b) unlawful administration of	0	0	0	0	0	0	0	0	0	0	0
Sec. 13(c) dangerous drugs	0	0	0	0	0	0	0	0	0	0	0
Sec. 14(1) = Administration of any dangerous drug to others	0	0	0	0	0	0	0	0	0	0	0
Sec. 15(a) = Self administration of any	12	92	3	0	0	0	0	0	0	0	107
Sec. 15(b) dangerous drug	0	0	0	0	0	0	0	0	0	0	0
Sec. 39A = Possession of heroin or morphine; or prepared or raw opium	0	92	129	83	47	12	9	1	0	0	373
Sec. 39B = Trafficking in dangerous drug (dadah)	0	0	1	0	1	0	11	2	15	62	92
Other sections of dangerous drugs act, 1952	98	716	40	0	0	0	0	0	0	0	854
TOTAL	654	4794	883	102	49	13	22	3	15	62	6597

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TABLE A-4 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

KIDNAPPING ACT No. 41/1961	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3(1)	0	0	0	3	0	0	0	0	0	0	3
Other Sections	0	0	0	1	0	0	0	0	0	0	1
TOTAL	0	0	0	4	0	0	0	0	0	0	4

TABLE A-5 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

INTERNAL SECURITY ACT, 1960 (REVISED 1972)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 57(1) = Possession of Firearm or/ and ammunition or explosive without authority	0	0	0	0	0	0	2	1	0	1	4
Sec. 58 = Consorting with person carrying or having possession of arms & explosives	0	0	0	0	0	0	0	0	0	0	0
Other sections	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	2	1	0	1	4

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TABLE A-6 ANNUAL ADMISSION IN 1993 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

OTHER VARIOUS LAWS/ ACTS	A	B	C	D	E	F	G	H	K	M	TOTAL
Offences under immigration Act, 1959 (revised 1975)	5408	805	3	0	0	0	0	0	0	0	6216
Offences under anti corruption Act, 1961	12	17	1	0	0	0	0	0	0	0	30
Offences under road traffic ordinance, 1958 (including road transport act,1987– Act 333)	244	13	1	0	0	0	0	0	0	0	258
Offences under customs Act, 1975 (revised 1980)	76	55	2	0	0	0	0	0	0	0	133
Offences under restricted residence enactment (cap. 39)	0	16	0	0	0	0	0	0	0	0	16
Offences under prevention of crimes ordinance, 1959	4	40	1	0	0	0	0	0	0	0	45
Offences under gambling Act, 1951-Act 289	151	17	0	0	0	0	0	0	0	0	168
Offences under minor offences ordinance, 1955	839	50	2	0	0	0	0	0	0	0	891
Other offences not mentioned above	3178	933	17	2	0	0	0	0	0	0	4130
TOTAL	9912	1946	27	2	0	0	0	0	0	0	11887
GRAND TOTAL (Table 3.1 to 3.6)	11656	10709	1748	316	171	43	25	7	26	71	24772

Note: Length of Sentence

A = Below 6 months of imprisonment.
B = 6 months to below 3 years of imprisonment.
C = 3 years to below 6 years of imprisonment.
D = 6 years to below 10 years of imprisonment.
E = 10 years to below 15 years of imprisonment.
F = 15 years to 20 years or more of imprisonment.
G = Imprisonment for life.
H = Imprisonment for the duration of natural life.
K = Detention under Sultan's pleasure.
M = Sentence of death by hanging.

TABLE B-1 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
109-120 = Offences of Abetment	1	2	0	1	0	0	0	0	0	0	4
120A-120B = Offences of Criminal Conspiracy	0	0	0	0	0	0	0	0	0	0	0
121-130 = Offences against the State	0	0	0	0	0	0	0	0	0	0	0
131-140 = Offences relating to the Armed Forces	2	1	0	0	0	0	0	0	0	0	3
143-160 = Offences against the Public Tranquillity	23	24	0	0	0	0	0	0	0	0	47
161-171 = Offences by/relating to Public Servants	7	12	1	0	0	0	0	0	0	0	20
172-190 = Contempts of the Lawful Authority of Public Servants	20	5	0	0	0	0	0	0	0	0	25
193-229 = False evidence and offence against Public Justice	26	18	0	0	0	0	0	0	0	0	44
231-263 = Offences relating to Coin and Government stamps	1	0	0	0	0	0	0	0	0	0	1
264-267 = Offences relating to Weights/Measures	0	0	0	0	0	0	0	0	0	0	0
269-294 = Offences affecting the Public Health/ Safety/ Convenience/ Decency/ Morals	3	0	0	0	0	0	0	0	0	0	3
295-298 = Offences relating to religion	13	42	4	0	0	0	0	0	0	0	59
302 = Murder	0	0	0	0	1	2	6	0	10	7	26
304 = Culpable homicide not amounting to murder	6	19	46	72	51	17	1	0	2	0	214
304A = Causing death by rash or negligent act	3	2	0	0	0	0	0	0	0	0	5
305 = Abetment of suicide committed by a child/ insane or delirious person/ an idiot/ a person intoxicated	0	0	0	0	0	0	0	0	0	0	0
306 = Abetting the commission of suicide	0	1	0	0	0	0	0	0	0	0	1
307 = Attempt to murder	1	1	0	1	0	0	0	0	0	0	3
308 = Attempt to commit culpable homicide	0	0	0	0	0	0	0	0	0	0	0
309 = Attempt to commit suicide	0	1	0	2	1	2	0	0	0	0	6
312-318 = Offences of the causing of miscarriage; of injuries to unborn children; of the exposure of infants; and of the concealment of births	4	8	5	1	0	0	0	0	0	0	18
323-338 = Offences relating to voluntarily causing hurt or grievous hurt	98	187	27	9	3	0	0	0	0	0	324
341-348 = Offences of wrongful restraint and wrongful confinement	0	13	0	0	0	0	0	0	0	0	13
352-358 = Offences of criminal force and assault	35	97	17	3	0	0	0	0	0	0	152
363-369 = Offences of kidnapping or abduction	0	12	1	0	0	0	0	0	0	0	13
370-374 = Offences of slavery and forced labour	0	4	0	0	0	0	0	0	0	0	4
376 = Rape	1	14	48	54	32	5	0	0	0	0	154
377 = Unnatural offence	1	3	3	8	10	1	0	0	0	0	26
377A = Outrage on decency	0	0	1	0	0	0	0	0	0	0	1
379 = Theft	428	1379	188	13	0	1	0	0	0	0	2009
380 = Theft in a building/ tent/ vessel	436	755	109	8	0	0	0	0	0	0	1308
381-382 = Other types of theft	50	63	10	1	0	0	0	0	0	0	124
384-389 = Various offences of extortion	5	37	21	5	0	0	0	0	0	0	68
392 = Robbery	11	177	66	13	6	0	0	0	0	0	273
393 = Attempt to commit robbery	5	8	3	3	0	0	0	0	0	0	19
394 = Robbery with causing hurt	4	28	24	13	5	0	0	0	0	0	74

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
395 = Gang robbery	0	11	14	4	1	0	0	0	0	0	30
396 = Gang robbery with murder	0	2	0	0	0	0	0	0	0	0	2
397 = Robbery with arms or with attempt to cause death or grievous hurt	7	12	16	22	0	0	0	0	0	0	57
399-402 = Conspiracy to commit gang robbery	1	2	0	0	0	0	0	0	0	0	3
403-404 = Offences of criminal misappropriation of property	7	7	0	0	0	0	0	0	0	0	14
406-409 = Offences of criminal breach of trust	11	70	11	6	3	0	0	0	0	0	101
411-414 = Offences of the receiving of stolen property	81	485	42	4	5	0	0	0	0	0	617
417-420 = Offences of cheating	25	115	21	1	0	0	0	0	0	0	162
421-424 = Offences of fraudulent deeds and disposition of property	0	0	0	0	0	0	0	0	0	0	0
426-440 = Offences of committing mischief	9	7	1	1	1	0	0	0	0	0	19
447-462 = Offences of criminal trespass	228	691	156	25	2	1	0	0	0	0	1103
465-489D = Offences of forgery relating to documents and to currency notes and bank notes	13	42	11	0	0	0	0	0	0	0	66
491 = Criminal breach of contracts of service	0	6	0	0	0	0	0	0	0	0	6
493-498 = Offences relating to marriage	0	0	0	0	0	0	0	0	0	0	0
500-502 = Offences of defamation	0	0	0	0	0	0	0	0	0	0	0
504-510 = Offences of criminal intimidation, insult and annoyance	12	31	2	0	0	0	0	0	0	0	45
511 = Attempt to commit offences	9	21	1	0	0	0	0	0	0	0	31
TOTAL	1587	4415	849	270	121	29	7	0	12	7	7297

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TABLE B-2 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

FIREARMS (INCREASED PENALTIES) ACT, 1971	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3 = Discharging a firearm in the commission of a scheduled offence	0	0	0	0	0	0	0	0	0	0	0
Sec. 3A = Being an accomplice in case of discharge of firearm	0	0	0	0	0	0	0	0	0	1	1
Sec. 4 = Exhibiting a firearm in the commission of a scheduled offence	0	0	0	0	1	0	0	2	0	0	3
Sec. 5 = Having a firearm in the commission of a scheduled offence	0	0	0	0	0	0	0	0	0	0	0
Sec. 6 = Exhibiting an imitation firearm in the commission of a scheduled offence	11	6	0	0	0	0	0	0	0	0	17
Sec. 7 = Trafficking in firearms	1	0	0	0	0	0	0	0	0	0	1
Sec. 8 = Unlawful possession of firearms	15	13	6	12	6	2	0	0	0	0	54
Sec. 9 = Consorting with persons carrying arms	0	4	1	4	1	0	0	0	0	0	10
TOTAL	27	23	7	16	8	2	0	2	0	1	86

TABLE B-3 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

DANGEROUS DRUGS ACT, 1952 (REVISED 1980)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 6 = Possession of raw opium/ coca leaves/ poppy-straws/ cannabis	151	354	57	2	5	1	0	0	0	0	571
Sec. 6B(1)(a) = Planting or cultivation of Any plant from which	1	0	1	0	0	0	0	0	0	0	2
6B(1)(b) = raw opium/ coca leaves/	1	0	0	0	0	0	0	0	0	0	1
6B(1)(c) = poppy/ straw/ cannabis may be obtained	0	0	0	0	0	0	0	0	0	0	0
Sec. 9(a) = Possession of/ import into or Export	0	9	1	0	0	0	0	0	0	0	10
9(b) = from Malaysia/ manufacture, sell	0	0	0	0	0	0	0	0	0	0	0
9(c) = or otherwise deal in any prepared opium	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(1)(a) = Use of premises, possession of utensils	9	0	0	0	0	0	0	0	0	0	9
Sec. 10(1)(b) = and consumption of opium	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(2)(a)	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(2)(b)	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(1)(a) = Import into or export from Malaysia	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(1)(b) = and dangerous drug	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(2)/(3) = Possession of any Dangerous drug	688	3439	618	13	5	1	0	0	0	0	4764
Sec. 13(a) = Keeping or using premises for	0	0	0	0	0	0	0	0	0	0	0
Sec. 13(b) unlawful administration of	0	0	0	0	0	0	0	0	0	0	0
Sec. 13(c) dangerous drugs	0	0	0	0	0	0	0	0	0	0	0
Sec. 14(1) = Administration of any dangerous drug to others	0	0	0	0	0	0	0	0	0	0	0
Sec. 15(a) = Self administration of any	11	68	0	0	0	0	0	0	0	0	79
Sec. 15(b) dangerous drug	0	0	0	0	0	0	0	0	0	0	0
Sec. 39A = Possession of heroin or morphine; or prepared or raw opium	0	80	118	75	103	18	5	0	0	0	399
Sec. 39B = Trafficking in dangerous drug (dadah)	0	0	0	0	0	0	6	0	3	39	48
Other sections of dangerous drugs act, 1952	182	888	67	0	0	0	0	0	0	0	1137
TOTAL	1043	4838	862	90	113	20	12	0	3	39	7020

TABLE B-4 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

KIDNAPPING ACT No. 41/1961	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3(1) of the kidnapping Act No. 41/1961	0	0	0	0	0	0	2	0	0	0	2
Other Sections of the kidnapping Act No. 41/1961	0	0	0	2	0	0	0	0	0	0	2
TOTAL	0	0	0	2	0	0	2	0	0	0	4

TABLE B-5 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

INTERNAL SECURITY ACT, 1960 (REVISED 1972)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 57(1) = Possession of Firearm or/ and ammunition or explosive without authority	0	0	0	0	0	0	0	0	0	1	1
Sec. 58 = Consorting with person carrying or having possession of arms & explosives	0	0	0	0	0	0	0	0	0	0	0
Other sections	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0	0	0	1	1

TABLE B-6 ANNUAL ADMISSION IN 1994 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

OTHER VARIOUS LAWS/ ACTS	A	B	C	D	E	F	G	H	K	M	TOTAL
Offences under immigration Act, 1959 (revised 1975)	8378	1698	9	0	0	0	0	0	0	0	10085
Offences under anti corruption Act, 1961	12	32	2	0	0	0	0	0	0	0	47
Offences under road traffic ordinance, 1958 (including road transport act,1987–Act 333)	266	28	0	0	0	0	0	0	0	0	294
Offences under customs Act, 1975 (revised 1980)	51	76	1	0	0	0	0	0	0	0	128
Offences under restricted residence enactment (cap. 39)	0	0	0	0	0	0	0	0	0	0	0
Offences under prevention of crimes ordinance, 1959	3	29	3	0	0	0	0	0	0	0	35
Offences under gambling Act, 1951-Act 289	149	22	1	0	0	0	0	0	0	0	172
Offences under minor offences ordinance, 1955	834	37	0	1	0	0	0	0	0	0	872
Other offences not mentioned above	3386	1151	20	3	0	0	0	0	0	0	4560
TOTAL	13080	3073	36	4	0	0	0	0	0	0	16193
GRAND TOTAL (Table 3.1 to 3.6)	15737	12349	1754	382	242	51	21	2	15	48	30601

Note: Length of Sentence

A = Below 6 months of imprisonment.
B = 6 months to below 3 years of imprisonment.
C = 3 years to below 6 years of imprisonment.
D = 6 years to below 10 years of imprisonment.
E = 10 years to below 15 years of imprisonment.
F = 15 years to 20 years or more of imprisonment.
G = Imprisonment for life.
H = Imprisonment for the duration of natural life.
K = Detention under Sultan's pleasure.
M = Sentence of death by hanging.

TABLE C-1 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
109-120 = Offences of Abetment	2	4	1	1	0	0	0	0	0	0	8
120A-120B = Offences of Criminal Conspiracy	0	0	0	0	0	0	0	0	0	0	0
121-130 = Offences against the State	0	0	0	0	0	0	0	0	0	0	0
131-140 = Offences relating to the Armed Forces	2	5	0	0	0	0	0	0	0	0	7
143-160 = Offences against the Public Tranquillity	11	17	8	0	0	0	0	0	0	0	36
161-171 = Offences by/relating to Public Servants	29	9	0	0	0	0	0	0	0	0	38
172-190 = Contempts of the Lawful Authority of Public Servants	13	7	0	0	0	0	0	0	0	0	20
193-229 = False evidence and offence against Public Justice	8	22	0	0	0	0	0	0	0	0	30
231-263 = Offences relating to Coin and Government stamps	1	2	0	0	0	0	0	0	0	0	5
264-267 = Offences relating to Weights/Measures	0	0	0	0	0	0	0	0	0	0	0
269-294 = Offences affecting the Public Health/ Safety/ Convenience/ Decency/ Morals	28	3	0	0	0	0	0	0	0	0	31
295-298 = Offences relating to religion	4	15	0	0	0	0	0	0	0	0	19
302 = Murder	3	3	0	1	9	3	1	0	2	10	32
304 = Culpable homicide not amounting to murder	6	8	26	34	33	11	3	0	11	3	129
304A = Causing death by rash or negligent act	2	13	7	11	5	8	0	0	0	2	48
305 = Abetment of suicide committed by a child/ insane or delirious person/ an idiot/ a person intoxicated	0	0	0	0	0	0	0	0	0	0	0
306 = Abetting the commission of suicide	0	0	0	0	0	0	0	0	0	0	0
307 = Attempt to murder	0	3	3	2	1	0	0	0	0	0	9
308 = Attempt to commit culpable homicide	0	1	0	0	0	0	0	0	0	0	1
309 = Attempt to commit suicide	1	1	0	0	0	0	0	0	0	0	2
312-318 = Offences of the causing of miscarriage; of injuries to unborn children; of the exposure of infants; and of the concealment of births	1	9	4	0	0	0	0	0	0	0	14
323-338 = Offences relating to voluntarily causing hurt or grievous hurt	113	129	29	1	0	0	0	0	0	0	273
341-348 = Offences of wrongful restraint and wrongful confinement	5	8	2	0	0	0	0	0	0	0	15
352-358 = Offences of criminal force and assault	28	101	18	1	0	0	0	0	0	0	148
363-369 = Offences of kidnapping or abduction	2	10	4	0	0	0	0	0	0	0	16
370-374 = Offences of slavery and forced labour	4	2	1	2	1	0	0	0	0	0	10
376 = Rape	1	5	56	72	32	2	0	0	0	0	168
377 = Unnatural offence	2	4	4	1	0	0	0	0	0	0	11
377A = Outrage on decency	17	17	6	0	0	0	0	0	0	0	40
379 = Theft	283	1189	152	13	0	0	0	0	0	0	1637
380 = Theft in a building/ tent/ vessel	303	755	56	1	0	0	0	0	0	0	1105
381-382 = Other types of theft	119	144	6	5	0	0	0	0	0	0	274
384-389 = Various offences of extortion	15	25	4	5	0	0	0	0	0	0	44
392 = Robbery	19	172	43	7	5	0	0	0	0	0	246
393 = Attempt to commit robbery	3	18	5	1	0	0	0	0	0	0	27
394 = Robbery with causing hurt	2	43	20	8	4	0	0	0	0	0	77

PENAL CODE (F.M.S. CAP 45)	A	B	C	D	E	F	G	H	K	M	TOTAL
395 = Gang robbery	0	11	5	4	3	0	0	0	0	0	23
396 = Gang robbery with murder	0	1	0	2	0	3	0	0	0	0	6
397 = Robbery with arms or with attempt to cause death or grievous hurt	0	12	8	6	0	0	0	0	0	0	26
399-402 = Conspiracy to commit gang robbery	2	4	0	0	1	0	0	0	0	0	7
403-404 = Offences of criminal misappropriation of property	2	14	0	0	0	0	0	0	0	0	16
406-409 = Offences of criminal breach of trust	16	104	9	6	0	0	0	0	0	0	130
411-414 = Offences of the receiving of stolen property	106	504	36	0	0	0	0	0	0	0	646
417-420 = Offences of cheating	6	66	22	0	0	0	0	0	0	0	95
421-424 = Offences of fraudulent deeds and disposition of property	0	3	1	0	0	0	0	0	0	0	4
426-440 = Offences of committing mischief	15	25	1	0	0	0	0	0	0	0	41
447-462 = Offences of criminal trespass	198	680	86	11	0	0	0	0	0	0	975
465-489D = Offences of forgery relating to documents and to currency notes and bank notes	6	30	5	2	0	0	0	0	0	0	43
491 = Criminal breach of contracts of service	1	5	0	0	0	0	0	0	0	0	6
493-498 = Offences relating to marriage	0	3	0	0	0	0	0	0	0	0	3
500-502 = Offences of defamation	0	0	0	0	1	0	0	0	0	0	1
504-510 = Offences of criminal intimidation, insult and annoyance	23	27	0	0	0	0	0	0	0	0	50
511 = Attempt to commit offences	0	12	0	0	0	0	0	0	0	0	12
TOTAL	1398	4235	628	188	96	29	4	0	13	15	6604

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TABLE C-2 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

FIREARMS (INCREASED PENALTIES) ACT, 1971	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3 = Discharging a firearm in the commission of a scheduled offence	0	0	0	0	0	0	0	0	0	2	2
Sec. 3A = Being an accomplice in case of discharge of firearm	0	0	0	0	0	0	0	0	0	2	2
Sec. 4 = Exhibiting a firearm in the commission of a scheduled offence	2	1	1	2	0	0	3	5	0	0	14
Sec. 5 = Having a firearm in the commission of a scheduled offence	0	0	0	0	0	0	0	0	0	0	0
Sec. 6 = Exhibiting an imitation firearm in the commission of a scheduled offence	4	3	1	01	0	0	0	0	0	0	9
Sec. 7 = Trafficking in firearms	0	0	0	0	0	0	0	0	0	0	0
Sec. 8 = Unlawful possession of firearms	19	14	6	18	3	0	0	0	0	0	60
Sec. 9 = Consorting with persons carrying arms	2	3	2	1	0	0	0	0	0	0	8
TOTAL	27	23	10	22	3	0	3	5	0	4	95

TABLE C-3 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

DANGEROUS DRUGS ACT, 1952 (REVISED 1980)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 6 = Possession of raw opium/ coca leaves/ poppy-straws/ cannabis	162	293	106	11	7	0	0	0	0	0	579
Sec. 6B(1)(a) = Planting or cultivation of Any plant from which	0	0	1	2	0	0	1	0	0	0	4
6B(1)(b) = raw opium/ coca leaves/	0	0	0	0	0	0	0	0	0	0	0
6B(1)(c) = poppy/ straw/ cannabis may be obtained	0	0	0	0	0	0	0	0	0	0	0
Sec. 9(a) = Possession of/ import into or	0	1	0	0	0	0	0	0	0	0	1
9(b) = Export from Malaysia/ manufacture, sell	0	4	0	0	0	0	0	0	0	0	4
9(c) = or otherwise deal in any prepared opium	2	1	0	0	0	0	0	0	0	0	3
Sec. 10(1)(a) = Use of premises, possession of utensils	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(1)(b) = and consumption of opium	0	0	0	0	0	0	0	0	0	0	0
Sec. 10(2)(a)	2	0	0	0	0	0	0	0	0	0	2
Sec. 10(2)(b)	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(1)(a) = Import into or export from Malaysia	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(1)(b) = and dangerous drug	0	0	0	0	0	0	0	0	0	0	0
Sec. 12(2)/(3) = Possession of any Dangerous drug	595	3592	645	43	1	0	0	0	0	0	4876
Sec. 13(a) = Keeping or using premises for	0	1	0	0	0	0	0	0	0	0	1
Sec. 13(b) unlawful administration of	0	0	1	0	0	0	0	0	0	0	1
Sec. 13(c) dangerous drugs	0	0	0	0	0	0	0	0	0	0	0
Sec. 14(1) = Administration of any dangerous drug to others	0	0	0	0	0	0	0	0	0	0	0
Sec. 15(a) = Self administration of any	4	214	19	0	0	0	0	0	0	0	237
Sec. 15(b) dangerous drug	10	28	0	0	0	0	0	0	0	0	38
Sec. 39A = Possession of heroin or morphine; or prepared or raw opium	3	65	100	99	96	15	12	0	0	0	390
Sec. 39B = Trafficking in dangerous drug (dadah)	0	2	1	3	1	0	14	1	1	41	64
Other sections of dangerous drugs act, 1952	338	949	35	0	0	0	0	0	0	0	1322
TOTAL	1116	5150	862	158	105	15	27	1	1	41	7522

TABLE C-4 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

KIDNAPPING ACT No. 41/1961	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 3(1) of the kidnapping Act No. 41/1961	0	2	0	0	0	0	2	0	1	0	5
Other Sections of the kidnapping Act No. 41/1961	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	2	0	0	0	0	2	0	1	0	5

TABLE C-5 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

INTERNAL SECURITY ACT, 1960 (REVISED 1972)	A	B	C	D	E	F	G	H	K	M	TOTAL
Sec. 57(1) = Possession of Firearm or/ and ammunition or explosive without authority	0	0	0	0	0	0	0	0	0	1	1
Sec. 58 = Consorting with person carrying or having possession of arms & explosives	0	0	0	0	0	0	0	0	0	0	0
Other sections	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0	0	0	1	1

TABLE C-6 ANNUAL ADMISSION IN 1995 – CONVICTED PRISONERS BY OFFENCE AND LENGTH OF SENTENCE

OTHER VARIOUS LAWS/ ACTS	A	B	C	D	E	F	G	H	K	M	TOTAL
Offences under immigration Act, 1959 (revised 1975)	7023	2141	0	0	0	0	0	0	0	0	9164
Offences under anti corruption Act, 1961	8	4	0	0	0	0	0	0	0	0	12
Offences under road traffic ordinance, 1958 (including road transport act,1987–Act 333)	186	12	0	0	0	0	0	0	0	0	198
Offences under customs Act, 1975 (revised 1980)	45	70	0	0	0	0	0	0	0	0	115
Offences under restricted residence enactment (cap. 39)	0	0	0	0	0	0	0	0	0	0	0
Offences under prevention of crimes ordinance, 1959	5	34	5	0	0	0	0	0	0	0	44
Offences under gambling Act, 1951-Act 289	92	92	0	0	0	0	0	0	0	0	184
Offences under minor offences ordinance, 1955	604	54	3	0	0	0	0	0	0	0	661
Other offences not mentioned above	3129	1405	82	7	0	0	0	0	0	0	4623
TOTAL	11092	3812	90	7	0	0	0	0	0	0	15001
GRAND TOTAL (Table 3.1 to 3.6)	13633	13220	1636	375	204	42	36	6	14	62	29228

Note: Length of Sentence

A = Below 6 months of imprisonment.
B = 6 months to below 3 years of imprisonment.
C = 3 years to below 6 years of imprisonment.
D = 6 years to below 10 years of imprisonment.
E = 10 years to below 15 years of imprisonment.
F = 15 years to 20 years or more of imprisonment.
G = Imprisonment for life.
H = Imprisonment for the duration of natural life.
K = Detention under Sultan's pleasure.
M = Sentence of death by hanging.